IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS, APPELLANT,

versus

JESSE J. FLOYD, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

JURISDICTIONAL STATEMENT FOR JAMES C. ANDERS

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Appellant, the defendant in the district court, appeals from the judgment of the United States District Court of South Carolina, Columbia Division, entered December 20, 1977, and submits this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the district court (Appendix A, *infra.*) is reported in 440 F. Supp. 535.

JURISDICTION

This suit was initiated on August 27, 1975; the plaintiff sought relief under 42 U. S. C. § 1983 and 28 U. S. C. § 2201. The district court's jurisdiction over the plaintiff's allegations rested on 28 U. S. C. § 1343.

Subsequent to the filing of the complaint, the Chief Judge of the Fourth Circuit, pursuant to 28 U. S. C. § 2284, constituted a district court of three judges (Haynsworth, Ch. C. J., Russell, C. J., and Chapman, D. J.) to hear and determine this case. Designation of a three-judge court was required by 28 U. S. C. § 2281,[1] because plaintiff sought to enjoin the operation of portions of §§ 44-41-10, *et seq.*, 1976 Code of Laws of South Carolina [2] (Appendix B, *infra*), the South Carolina abortion statute.

The three-judge court implied or determined in an opinion filed on November 4, 1977, that the South Carolina abortion statute was unconstitutional facially or as applied to a particular abortion performed by the plaintiff, that a part of § 44-41-20(c) was facially unconstitutional in requiring consultation among physicians and the husband's consent in certain situations, and that § 44-41-30(c) also was facially unconstitutional in requiring parental consent for minors under 16.[3] The Court also held that *Roe v. Wade*, 410 U. S. 113 (1973) precluded a homicide prosecution in connection with the aforementioned abortion performed by plaintiff. The Court's final judgment and injunction was entered on December 20, 1977 (Appendix C, *infra*). The Defendant filed a timely notice of appeal to this Court on January 10, 1978 (Appendix D, *infra*).

The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U. S. C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Turner v. Fouche*, 396 U. S. 346 (1970); *Allen v. State Board of Elections*, 393 U. S. 344 (1969); *Flast v. Cohen*, 392 U. S. 83 (1968).

[1] This action predates the 1976 amendments to 28 U. S. C. § 2281.

[2] §§ 33-682 *et seq.*, under the 1962 codification in effect when the suit was brought.

[3] Appellant does not appeal the holdings concerning the consulting-physician requirement and the parental and spousal consent requirements.

QUESTIONS PRESENTED

1. Whether the Missouri statutory definition of viability (the point when life can be "continued indefinitely outside the womb") approved in *Planned Parenthood v. Danforth*, 428 U. S. 52 (1976), is the only constitutionally permissible definition of viability in light of *Roe v. Wade*, 410 U. S. 113 (1973), which defines viability as the point when a fetus is "potentially able to live outside the mother's womb?"

2. Whether any constitutional definition of viability supports a conclusion that a child which is born as the result of an abortion and lives for 20 days is not viable as a matter of law?

3. Whether the lower court should have abstained when proposed indictments had been submitted to a state grand jury before any hearing in the district court, where no bad faith was proven, and where the South Carolina abortion statute under which the prosecution was proceeding was not "flagrantly and patently unconstitutional?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourteenth Amendment to the Constitution of the United States; Section 1979 of the Revised Statutes of the United States, 42 U. S. C. § 1983; and Sections 44-41-10 and 44-41-20, of the 1976 Code of Laws of South Carolina are set forth in Appendix B.

STATEMENT

A. Proceedings below.

The plaintiff, now appellee, in this action is Jesse T. Floyd, M.D., "a physician specializing in abortions," [4] whom the defendant, the prosecutor for Richland County (Columbia), South Carolina, sought to indict for illegal abortion and homicide. Dr. Floyd alleged that the abortion for which indictments were being sought was protected by *Roe v. Wade,* 410 U. S. 113 (1973) and that as a result any prosecution connected with that abortion was precluded. A temporary injunction was issued by the district judge on August 28, 1975, by which time the proposed indictments had been submitted to the state grand jury. The complaint was later amended to seek declaratory relief with respect to parts of the South Carolina abortion statute which required, in certain instances, parental consent (§ 44-41-30 (b)), spousal consent (§ 44-41-20(c)) and consultation among physicians (*Id.*).

Discovery in the case consisted primarily of depositions taken by Dr. Floyd's counsel on the question of prosecutorial bad faith. In addition a deposition of the principal draftsman of the abortion statute was taken.

The case was argued before the three-judge panel on November 4, 1976. The court issued an opinion on November 4, 1977, and a final order and injunction on December 20, 1977.

B. The abortion.

In the spring of 1974, Louise, an unmarried woman twenty years of age, became concerned that she might be pregnant.[5] She visited a general practitioner in April, 1974, and was cursorily examined by a nurse, but was merely

[4] App. A, p. 1a.

[5] Dep. of "Louise Doe" (pseudonym), p. 7.

given some medicine which in some cases causes the menstrual period to start.[6] This proved ineffective, but Louise did nothing further until July 19, 1974, when she visited the Richland County Health Clinic and was there diagnosed by a Dr. Kanitkar as being 18 to 20 weeks pregnant.[7] After consulting with a social worker as to what to do next, Louise visited Dr. Floyd's clinic on July 31, 1974. The evidence conflicts as to the estimate which Dr. Floyd gave Louise on that occasion. In his examination notes Dr. Floyd wrote that she was twenty weeks pregnant at the time, but Louise has testified that he told her she was 16 to 17 weeks pregnant.[8] Except for Louise's testimony that on subsequent visits Dr. Floyd continued to tell her that she was "on the borderline of going into the hospital," [9] there is nothing in the record to indicate whether he made any further estimate of the length of the pregnancy in the five weeks which were to ensue before the abortion was attempted.[10]

On September 4, 1974, Louise entered the hospital to have the abortion performed. Late that evening Dr. Floyd gave her a prostaglandin injection to induce the expulsion of the fetus,[11] and apparently left her shortly thereafter.[12] Labor began an hour later and continued for over 24 hours; it culminated on September 6, 1974, when Louise, alone in her hospital room, gave birth to a male infant. She rang for

[6] *Id.*, at p. 9.

[7] Kanitkar Dep., p. 17. (16 to 18 weeks from conception). Unless otherwise noted herein, all references to number of weeks will be to "gestational age," which is computed from the last menstrual period. See L. Hellman & J. Pritchard, Williams Obstetrics 199 (14th Ed. 1971).

[8] Dep. of "Louise Doe," p. 21.

[9] *Id.* at p. 26. The meaning of this statement, if in fact it were made, is unclear since Louise by any estimate was well past the point at which § 44-41-20(b) requires abortions to be performed in a hospital or certified clinic.

[10] Dr. Floyd contended below (Br. for Plaintiff, p. 5) that a quota on abortions at Richland Memorial Hospital was responsible "in large part" for the five-week delay. There are indications in the record that the quota system was not in effect throughout most of August, 1974 (Khoury Dep. p. 5); but even if it had been, it bore no relation to the possible criminality of the abortion.

[11] Garrett Dep., Ex. 5, p. 1.

[12] See Affidavit of "Louise Doe", p. 3 (Cook Dep., Ex. 2).

the nurse. Several nurses entered the room, one of whom asked Louise whether she knew the baby was a "seven month baby." [13] The child[14] was thereupon taken to the neonatal intensive care unit, where he was found to weigh 1,049 grams.[15] Twenty-four hours later, Dr. Floyd made his first visit to Louise in the two and one-half days since the injection and said of the infant, in Louise's words, "that he thought there was a slight chance of him living but he did not think he was going to live." [16] Louise was discharged the following day and recovered without incident.

C. Postnatal care of the child.

The child lived for twenty days following his premature birth. Throughout this period, he was in the neonatal intensive care unit, alternating between being in relatively sound condition and being in crisis.[17] Bowel difficulties and blockages led to surgery on September 19, 1974, when the child was almost two weeks old.[18] A temporary improvement occurred, but the bowel condition ultimately led to peritonitis. On September 26, 1974, the child died at 20 days of age; the pathologist who performed the autopsy testified in his deposition that death was caused by the numerous complications which arose from the child's premature birth.[19]

D. Estimates of the child's gestational age.

There appears to be general agreement that birth weight, 1,049 grams in this instance, is the principal source

[13] Dep. of "Louise Doe," p. 45.

[14] The nature of this case presents obvious difficulties in referring to the subject of the abortion. However, the lower court used the term "child" several times in its opinion when describing the subject's postpartum life (see App. A, p. 3a) and that usage will be followed herein. The term "fetus" will be used in referring to the prenatal stage.

[15] See Garrett Dep., Ex. 5, p. 1.

[16] Affidavit of "Louise Doe," p. 3 (Cook Dep., Ex. 2).

[17] See Garrett Dep., Ex. 5 (summary of clinical and laboratory data).

[18] *Id.*

[19] Garrett Dep., p. 37.

of information as to the gestational age of a newborn.[20] The importance of gestational age in this case is that it provides a standard for determining Dr. Floyd's opportunity to know that the fetus which he attempted to abort was likely to be viable.

Aside from Dr. Floyd, only one other physician, the aforementioned Dr. Kanitkar, examined Louise before the abortion. Dr. Kanitkar estimated that she was 18 to 20 weeks pregnant.[21] When Dr. Floyd saw Louise two weeks later, his estimate was 20 weeks. However, five weeks elapsed before the abortion was performed, and Dr. Kanitkar testified that if he were faced with the possibility of performing an abortion toward the end of the second trimester, he would conduct an ultrasound examination, a more accurate method of determining gestational age than the abdominal and pelvic examinations used in this case.[22]

Dr. Antoinette Wall was the one deponent who saw the infant immediately after its birth and who was asked about the gestational age at birth; although Dr. Wall recognized the usual possibilities of erring several weeks either way, she testified that her opinion was that the infant was around 26 weeks gestation.[23] Another physician in the neonatal intensive care unit was not asked about a specific number of weeks, but did state that she had "seen many babies that

[20] See, *e.g.*, Silverman, Ed., *Perinatal Pediatrics*, p. 15: "BIRTH WEIGHT. This is the most consistently and accurately recorded datum available for use in evaluating the growth of the fetus; and as a single observation made at birth, it is the most valuable one."

[21] Kanitkar Dep. pp. 10-11 (16-18 weeks from conception, which translates to 18-20 weeks gestational age).

[22] The availability of sonography in Columbia at the time is disputed in the record (cf. Dennis Dep. p. 17 and Horger Affidavit, p. 5). Also in dispute is the utility of the procedure. However, one of Dr. Floyd's expert witnesses has co-authored a textbook chapter which states:

> "[S]onography appears to be more reliable overall when compared with clinical examination. Therefore, the use of sonography in the late second trimester may avoid the inappropriate termination of pregnancies beyond 22 weeks gestation." [The 22-week limit was imposed at the facility at which the study was conducted.]
>
> Attachment to Affidavit of Theodore M. King, M.D., p. 13.

[23] Deposition of Antoinette W. Wall, M.D., p. 13.

have been born at this weight and condition that have lived." [24]

One other deponent who saw the infant was Dr. Charles Garrett, the pathologist who performed the autopsy. His conclusion, based primarily on norms set out in medical treatises, was that an infant whose birth weight was 1,000 grams would fall between 26 and 30 weeks gestational age, with the mean at 28 weeks.[25]

Dr. Floyd produced, approximately one month prior to the hearing before the three judge court in early November, 1976, affidavits of seven physicians, none of whom had seen the infant or the mother.[26] Their affidavits emphasized the variability of fetal ages which a given birth weight can signify.

E. **The prosecution.**

Shortly after the child's death, the Executive Director of the hospital in which the abortion was performed wrote the then Solicitor (prosecuting attorney) of Richland County, enclosing the medical records in the case and referring the matter "for whatever disposition that your office would desire to make," in light of the abortion statutes.[27] No action was taken by the prosecutor and no reasons why are in the record, although the district judge has noted that at the time the prosecutor was a lame duck with only two and one-half months to serve.[28]

[24] Affidavit of Annette P. Johnson, M.D., p. 4 (Ex. 9 to Cook Dep.)
[25] Garrett Dep., p. 16.
[26] Over a year before, Mr. Anders had served interrogatories which inquired concerning the existence of such witnesses as the seven physicians; Dr. Floyd's original answer named no one and were never supplemented despite the provisions of Rule 26(e)(1), F. R. C. P. Although several of the affidavits were executed in June or July, 1976, their existence was not made known to Anders until early October.
[27] Cook Dep., Ex. 10. On the day after the infant's birth, the Executive Director of Richland Memorial Hospital ordered that Dr. Floyd's privileges at the hospital be suspended. The OB/GYN staff later ratified this decision after a hearing. Wyman Dep., p. 7.
[28] Transcript of Hearing, 8/28/75, p. 21.

In April, 1975, attorneys for the hospital called the new prosecutor, Mr. Anders, to remind him of the hospital's letter to his predecessor. This was the first Mr. Anders had heard of the matter.[29] He ordered an investigation by several different individuals, which resulted in numerous sworn statements being taken.

The facts revealed in the investigation led Mr. Anders to conclude that there existed sufficient grounds for indictments.[30] Accordingly, he decided to seek an indictment for abortion as well as one for murder, the liveborn infant having died as the result of an act by Dr. Floyd.

On the morning of August 28, 1975, the case was presented to the Richland County Grand Jury by a State Law Enforcement Division official who had investigated the matter.[31] The grand jury's usual practice was to vote on each case immediately after the presentation;[32] it did so in this case and voted to indict on both grounds.[33] However, this and all other indictments voted upon on August 28, 1975, were not reported out in open court until the following morning.[34]

On August 27, 1975, one day prior to the presentation to the grand jury, Dr. Floyd had filed his complaint in the district court seeking to enjoin any anticipated state court proceedings. However, Mr. Anders had not personally received the complaint before the case went to the grand jury the following morning (August 28).[35] The federal hearing which resulted in the issuance of a temporary injunction occurred on the afternoon of August 28. The injunction held the state proceeding in abeyance until December 20,

[29] Anders Dep., pp. 7-8.
[30] Anders Dep., pp. 26-29.
[31] Cook Dep., p. 47.
[32] Dep. of Arthur Taylor (Grand Jury Foreman), pp. 5-6.
[33] *Id.*
[34] *Id.*
[35] Transcript of Hearing, 8/28/75, p. 29.

1977, when the district court made the injunction permanent.

F. **Opinion of the district court.**

In its opinion (issued on November 4, 1977, several weeks before the final judgment and permanent injunction were entered), the district court held that the timing of the commencement of the state and federal proceedings was immaterial because the prosecution was brought when "it should have been obvious to the prosecutor that there was no possibility of his obtaining a conviction that could have been constitutionally sustained." (App. A, p. 5a.) This, the court held, constituted bad faith as defined by *Younger v. Harris,* 401 U. S. 37 (1971). The lower court's conclusion was based on *Roe v. Wade,* 410 U. S. 113 (1973), sustaining the mother's right to terminate her pregnancy so long as the fetus is not viable, and on the court's conclusion that "[s]eemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb, but he did have the capacity to live for twenty days, as he did." App., A. p. 3a.

The Questions Are Substantial

The lower court's decision warrants plenary review. The definition of "viability" employed by the court below permits the destruction of fetuses which, under *Roe v. Wade,* 410 U. S. 113 (1973), are viable and the proper subjects of compelling state interest. Moreover, the decision denies protection of law to infants born alive after an abortion—persons under the United States Constitution, the common law and the laws of the State of South Carolina.

This is the only decision in the nation which has had occasion to apply an abortion statute to a procedure performed upon a fetus in the latter stage of pregnancy where

viability is possible, if not probable.[1] Thus, the risk exists that its definitional errors will be magnified as physicians and courts look to it for guidance.

Even if the instant case were to have no impact beyond the State of South Carolina, the lower court's opinion is impenetrably vague in its discussion of that part of the state abortion statute under which a prosecution for the abortion of a viable fetus might be brought. The opinion does not disclose under what circumstances a state prosecution might be had, if at all, and any such prosecution would surely lead to another federal action for an injunction in view of the confusion created over the present integrity of the abortion statute by the court below. This is so even though this Court has determined that nontherapeutic abortions performed upon viable fetuses may be proscribed by the state. *Roe,* 410 U. S. at 163-164.

Further, the lower court clearly misapplied the "bad faith" and "flagrant and patent unconstitutionality" exceptions to the doctrine of federal abstention in *Younger v. Harris,* 401 U. S. 37 (1971). The prosecutor was held to have acted in "bad faith" because he failed to foresee that the lower court would apply a standard of viability contrary to statute and to this Court's definition in *Roe,* 410 U. S. at 160, when the infant victim survived the abortion by 20 days and had the birthweight of a viable fetus. The lower court apparently held South Carolina's abortion statute "flagrantly and patently violative of express constitutional prohibitions * * *"[2] without ever holding it facially unconstitutional in relation to the time after which it proscribed abortion (although even facial unconstitutionality is sufficient to enjoin a state prosecution under *Younger; see* 401 U. S. at 54).

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[1] *Commonwealth v. Edelin,* 359 N.E. 2d 4 (Mass. 1976), involved only a prosecution for manslaughter, there being no Massachusetts abortion legislation in effect at the time of the indictment.

[2] App. A, p. 6a.

The lower court's opinion thus contravenes settled principles of federalism, while denying the State's compelling interest in protecting a class of viable fetuses, as it may validly do under *Roe*. This was accomplished in such a confusing manner that the need for clarification will make further federal-state conflicts inevitable.

I. The District Court erred by applying the Missouri statutory definition of "viability," rather than the definition of this Court in Roe v. Wade, 410 U. S. at 160, and erroneously concluded that an infant born as the result of an abortion and who survived 20 days was not viable as a matter of law.

A. **The District Court erroneously defined viability.**

In *Roe v. Wade*, 410 U. S. 113, 160 (1973), this Court held that viability is reached when a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." This definition was repeated in *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52, 64 (1976). But in the instant case the lower court ignored the *Roe* definition and apparently misread *Danforth*, where this Court had approved the Missouri statutory definition of viability as when life can be "continued indefinitely outside the womb. . . ." 428 U. S. at 63. This Court carefully noted in *Danforth* that the point of viability as defined in Missouri "may well occur later in pregnancy" than the point of viability as defined in *Roe*. *Danforth*, 428 U. S. at 64. Nevertheless, the lower court in the instant case held that "seemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb. . . ." (App. A, p. 3a).[3]

[3] This sentence, found in the opinion's statement of facts, is the court's only mention of why this infant was not viable. Nevertheless, the remainder of the opinion turns on this conclusion.

Thus the lower court went beyond the requirements of the Constitution, the decisions of this Court and the law of South Carolina by requiring that an infant must live "indefinitely" outside the womb before he might be deemed viable.

The court then compounded its error by creating a "wait-and-see" test to determine whether a child was capable of "indefinite" life. Rather than observing that birth weight and apparent gestational age of the infant at birth raised the inference that he had been potentially able to survive—as he did survive for 20 days in spite of the abortion—the lower court simply held that since he did not live, he was not viable in the first place.

At least two consequences flow from the decision of the District Court.

First, aside from the result in the instant case, the court's erroneous recitation of the *Roe* standard of viability has effectively foreclosed the state from enacting legislation which would be constitutional under *Roe*. Even though the State may properly assert its compelling interest in protection of those fetuses potentially, rather than indefinitely, able to survive abortion, such legislation is unlikely after the decision of the lower court. The legislature would be loath to enact a statute which would seem certain to be invalidated and which would lead to another hiatus in the State's valid efforts to proscribe nontherapeutic abortions after viability.

Second, the decision of the lower court encourages the physician to act contrary to the compelling interests of the state and of the viable fetus. If "indefinite" survival of an infant outside the womb is to be the constitutional standard of viability, a physician could insure "nonviability" and its accompanying constitutional immunity simply by employing that method of abortion least likely to assure survival.

The Constitution surely cannot be said to mandate a regulatory scheme which effects this result.[4]

Finally, the court overlooked the fact that once pregnancy advances to viability, at which point nontherapeutic abortion becomes subject to proscription, the act of performing the abortion procedure is itself defined in South Carolina as the criminal act, regardless of whether the fetus ultimately survives. §§ 44-41-10 (a), App. B, p. 8a.[5] This definition, which analogizes abortion to a crime of attempt, was not affected by *Roe*.[6] The definition stands in plain opposition to the court's reasoning, but was never even discussed.

B. **Questions concerning the application of the viability concept to these facts must await the development of the factual record.**

The lower court having erred in defining viability, there remains the factual issue of whether this fetus was viable under the *Roe* standard. The determination of this issue would be premature in light of the posture of the case, even if it were properly before the district court rather than the state courts. This case was before the lower court on motion for summary judgment; all the evidence was taken by depositions, by affidavit or by documentary evidence. Beyond its conclusion as to viability, which was

[4] In some cases, of course, the stillborn fetus might be so far advanced that its viability but for the abortion would not be subject to reasonable doubt by experts. The difficulties which the court's opinion raises, however, lie in the cases of doubt which will occur prior to the lattermost stage of pregnancy.

[5] The states do not uniformly define the act. Cf. Indiana Code, § 35-1, ch. 58.5(b); Illinois Revised Statutes, Ch. 38, § 81-22(6) (both making fetal survival irrelevant) and § 2(1) of the Missouri statute quoted in *Danforth*, 428 U. S. at 84 (destruction of the fetus a prerequisite).

[6] *Roe* only serves to limit the proscription of the procedure to the postviability period.

akin to a legal conclusion, the lower court made no findings of fact concerning the aborted fetus, nor did it make any determination as to which facts were in dispute.[7]

This Court has emphasized that viability is a medical concept to be determined through the judgment of the physician. *Roe*, 410 U. S. at 164; *Danforth*, 428 U. S. at 61-63. It follows that viability is an issue of fact to be proved through medical testimony, subject to cross-examination and impeachment. Yet, without findings of fact, the lower court apparently proceeded upon the irrebuttable presumption that if a fetus or infant dies subsequent to abortion he is "nonviable" as a matter of law.

It should be stressed that this infant weighed 1,049 grams at birth and that the medical textbook employed in *Roe* to illustrate general medical opinion as to viability states:

> Interpretations of the word "viability" have varied between fetal weights of 400 g (about 20 weeks of gestation) . . . Attainment of a weight of 1,000 g is therefore widely used as the criterion of viability. Infants below this weight have little chance of survival, whereas those over 1,000 g have a substantial chance. . . .
>
> L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971).

J. Pritchard, Williams Obstetrics 493 (14th ed. 1971).

It may be that a finder of fact might conclude that the aborting physician's medical judgment was not intentionally directed or wantonly negligent toward abortion of a viable fetus. It may be that a finder of fact would conclude that the infant was not viable when the abortion was per-

[7] In addition, the record was developed only on the question of prosecutorial bad faith, as the district judge initially directed (Transcript of Hearing, 9/17/75, found in "Louise Doe" Dep. p. 60). Cases such as *Cameron v. Johnson*, 390 U. S. 611, 621 (1968) have held that the federal inquiry as to bad faith does not turn on the sufficiency of the evidence at the state level. Accordingly, the prosecutor did not attempt to produce all possible medical evidence as to viability.

formed. But in view of clear medical evidence that this infant may have been viable, these questions must at least await cross-examination of Dr. Floyd's affiants, if not remand to the state court for a full exposition of the evidence.

II. The District Court should have abstained pursuant to Younger v. Harris, 401 U. S. 37 (1971).

A. A state criminal proceeding was pending before any federal proceeding of substance took place. [8]

As the chronology of events set forth in the Statement (pp. 8-9, supra) reveals, the indictment had been presented to the grand jury and voted on by it on the morning of August 28, 1975, all before the prosecutor was served with the complaint and temporary restraining order.[9] At 3:00 in the afternoon of the same day, a hearing on the question of the issuance of a temporary injunction was held before the district judge. The prosecutor was present and represented himself at this hearing, which lasted about an hour and culminated in the issuance of the temporary injunction. On the question of the pendency of the state proceeding, the following exchange took place:

> Mr. ANDERS: I have previously submitted this matter to the Grand Jury, Your Honor, because this was not served upon me until after it had been submitted. It has gone to the Grand Jury and I am waiting for them to return at this time. I don't want you to think that I'm . . . .

[8] This question, about which the court expressed an opinion, App. A, p. 2a, but did not deem it necessary to reach, is logically discussed first.

[9] Evidence of the absence of notice to the prosecutor prior to the submission of the case to the grand jury is in the record (Transcript of Hearing, 8/25/75, p. 29), and has not been disputed.

> The COURT: Where the law refers to an ongoing criminal prosecution, and this one hasn't gotten to that stage yet. So I will issue the Order . . . .
>
> Transcript of Hearing, 8/25/75 p. 29.

Assuming without conceding that the hearing on the afternoon of August 25, 1975, was a "proceeding of substance" (*Hicks v. Miranda*, 422 U. S. 332, 349 (1975)) in the federal court, that proceeding still did not take place before the prosecution had commenced.

The State court's procedural mechanism had already begun to run with the presentation of the case to the grand jury and had gone past a mere beginning with that body's immediate vote to return an indictment before the first proceeding of substance in federal court had occurred, and indeed before the federal complaint had ever been served on any state official. The plaintiff's only hope of escaping the *Younger* doctrine is to argue, as he did below, that the state proceeding did not become a pending one until the indictment was formally returned in open court the day after the hearing in the district court. The contention appeals only to dry logic. Once the matter had been submitted to the grand jury and voted upon, the State's interest in the proceeding had obviously attached, and few actions short of halting a state criminal trial could have disrupted it more. The only action which the prosecutor could have taken to "withdraw the indictment," as he was orally ordered to do by the district judge, would have been to enter the grand jury room or to call out the grand jury and ask that the already-voted-on indictment be handed over

and destroyed.[10] Aside from the immediate offense which this would have given to all concerned, it would have also required a duplication of the grand jury's efforts by another body should the plaintiff's federal suit ultimately fail.

This Court has declined to rely on merely formal requisites of procedure in determining whether a state or federal proceeding has begun; the primary instance of such a rule is found in *Hicks*, which held that federal proceedings began not with the formal filing of a complaint, but instead only when a "proceeding of substance" had taken place. The purpose of the *Younger* rule, of course, is to prevent federal injunctions which would constitute "an offense to the State's interest" in its proceedings, *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 604 (1975), and the "disruption of suits by the State in its sovereign capacity." *Trainor v. Hernandez*, 431 U. S. 434, 446 (1977). Thus when a state official takes an action which announces his intent to commence a state proceeding and which actually places the case before the state court, the State interest which *Younger* intended to protect is present.[11]

In a number of cases, it has been held that the State's interest in a criminal proceeding attaches prior to indictment, with the courts accordingly dismissing federal actions

[10] Dr. Floyd argued below that the prosecutor should have complied with the literal terms of the district judge's initial order, *i.e.*, that he should have withdrawn the indictment. The lower court impliedly rejected this contention; its final order, entered on December 20, 1977, simply enjoins the prosecutor "from proceeding to prosecute [Dr. Floyd] on any of the charges contained in the indictment returned August 29, 1975" and from seeking any new indictment on the same facts. The prosecutor has taken no action against Dr. Floyd since the court's oral order on August 28, 1975, over two years before the injunction became permanent.

[11] Such action also moves the case away from the principles enunciated in *Steffel v. Thompson*, 415 U. S. 452 (1974), and *Doran v. Salem Inn*, 422 U. S. 922 (1975). In both, a state prosecution against the federal plaintiffs would or might have occurred only if they repeated the conduct which they alleged was protected and thereby suffered arrest and the filing of new criminal charges. Dr. Floyd, on the other hand, was made certain before any federal hearing took place that he would be prosecuted for his single past act. If the grand jury had not returned indictments, of course, the question of Younger's application would have been mooted; see *Steffel*, 415 U. S. 452, 463 n. 12.

brought by the state defendant. See, e.g., *Lewis v. Kugler*, 446 F. 2d. 1343, 1348 (3rd Cir. 1971) (state proceeding had not gone beyond searches and seizures); *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (E. D. N. Y. 1976) (grand jury investigation); *Oldroyd v. Kugler*, 352 F. Supp. 27 (D. N. J. 1973) (arrest).[12] As to proceedings being deemed "pending" prior to indictment in other contexts, *see, e.g., State v. Ensor*, 277 Md. 529, 356 A. 2d 259 (1976); *U. S. v. New Departure Mfg. Co.*, 195 F. 778 (W. D. N. Y. 1912); Annot., 122 A. L. R. 670. Moreover, in *Hicks*, for example, the state proceeding was initiated with only a unilateral act by a state official, such as the filing of a criminal complaint.[13] *See also, Munson v. Janklow*, 563 F. 2d 933 (8th Cir. 1977). No distinction exists between such a unilateral act and submitting a proposed indictment to a grand jury with a reasonable belief that probable cause to indict exists. The State's interest was triggered in this case as in those, and the State proceeding accordingly should not have been enjoined.

B. The prosecution was not brought in bad faith.

The district court, as noted earlier, assumed without deciding that a state prosecution was pending. It held nevertheless that the prosecution could be enjoined because in the court's view it was brought in bad faith:

> Had the prosecutor but read the opinion for the majority in *Roe v. Wade*, he would have known that the fetus in this case was not a person whose life state law could legally protect.
>
> • • •

[12] Cf. *Dombrowski v. Pfister*, 380 U. S. 479, 484, n. 2 (grand jury not convened before federal complaint filed).

[13] State constitutional provisions which require that a defendant be charged by indictment (see, e.g. South Carolina Constitution, Art. I, Sec. 11) are generally held not to affect the question of whether a prosecution has begun or is pending. See e.g., *State v. Williams*, 192 La. 713, 189 So. 112 (1939).

> Since the prosecutor was chargeable with knowledge of what the Supreme Court had done and said in *Roe v. Wade*, his decision to proceed to seek and obtain indictments of Dr. Floyd, in the face of that knowledge, cannot have been in good faith.
>
> App. A, p. 6a.

In other words, the prosecutor should have known that under *Roe*, this fetus was not viable. However, it has been demonstrated above that the court itself misapplied *Roe* in defining viability and that the question of whether the fetus was "potentially able to live outside the womb. . ." remains to be decided in fact and in law. If the court's definition of viability was in error, its finding of bad faith must also fall.[14]

Building upon the above holding and assuming that the prosecutor knew this fetus to be nonviable, the court imputed to him a theory of the prosecution which he never formulated, namely that a prosecution for the abortion of even a nonviable fetus was possible because the abortion was performed after the twenty-fourth week:

> We cannot fault the prosecutor for thinking that it would not be unreasonable for a state to proscribe all abortions after the twenty-fourth week.
>
> App. A, p. 5a.

The prosecutor never in fact viewed the case in this way, because he was proceeding on the assumption that the fetus was viable. At the first hearing in the district court, the day after this action was commenced, he told the court:

> [C]ertainly we feel that the fetus was viable in light of the definition given [by § 44-41-10(l)] and the fact that the child did live for some twenty days.
>
> Transcript of Hearing, 8/28/75, p. 17.

[14] Both the lower court and plaintiff's counsel have noted that the prosecutor had read only a synopsis of *Roe* rather than the opinion itself. While this adds a surface luster to plaintiff's claim of bad faith, the fact is that a reading of *Roe* would not have led one to believe that the prosecution was futile, and it still does not.

The court inexplicably ignored this statement, as well as the prosecutor's contention before the three-judge court (after *Danforth*) that the statute should be construed so that "prosecutions could *not* be based upon abortions performed on nonviable fetuses." (Br. for Defendant, p. 9; emphasis added.)

The state proceeding was a prosecution for the abortion on a fetus believed by the prosecutor to be viable. The correctness of this belief has been challenged by Dr. Floyd, but as noted above, the success of this challenge turns on unresolved questions of fact. Admittedly the prosecutor also originally was concerned with the number of weeks of pregnancy involved, but in late 1975 when the prosecution began, this approach was being argued for by physicians (*Danforth*, 428 U. S. 52, 63) and it could not have been predicted with certainty that the argument would fail.[15] To hold, as the lower court did, that a careful reading of *Roe* would reveal fatal defects in the number-of-weeks approach, would be to hold the prosecutor to a standard of rare if not unprecedented prescience, and even so would not defeat the alternative ground, viability, on which the prosecution was pending.

C. South Carolina's abortion statute may be construed to prohibit only abortions after viability.

The lower court incorrectly concluded that this case constituted an exception to *Younger v. Harris*, *supra*, in that § 44-41-20 (c), as apparently construed by the court, was facially unconstitutional. While *Younger* held that a prosecution under a defective statute might be enjoined "even in the absence of . . . bad faith and harrassment," 401 U. S. at 53, the statute's defect must go beyond mere facial unconstitutionality, with the statute being instead "fla-

[15] At least one model act, drafted by students at Vanderbilt Law School, followed the same approach. See Abortion after Roe and Doe: A Proposed Statute, 26 Vand. L. R. 823 (1973).

grantly and patently violative of express constitutional prohibitions, in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 401 U. S. at 53-54, quoting *Watson v. Buck*, 313 U. S. 387. This standard (which this Court has never applied to enjoin a prosecution) is not met by a mere conclusion of possible facial invalidity, 401 U. S. at 54, and the lower court never explicitly held that facial unconstitutionality existed. Instead, it confused this exception to *Younger* with another one, bad faith, intertwining the two to make the whole greater than the sum of its parts.[16] The court, whose opinion is quoted in the footnote, simply omitted the greater part of the *Younger-Watson* definition of "flagrant and patent" unconstitutionality.[17] The end result is that the court has failed to inform South Carolina's officials whether § 44-41-20 (c) has been deemed invalid in every conceivable application or only as applied in this instance.[18] The ensuing confusion means that the statute will either have to be amended (although the court might not have actually thought amendment necessary) or prosecutions for abortions performed after viability will have to be foregone.

The all-inclusive invalidity of the sort required by the *Younger-Watson* test is simply absent here, and the prosecution thus was erroneously enjoined.[19] The statute is constitutional as applied to abortions performed after viability, and may be construed by the state courts to insure that it applies only to such abortions. Thus, even if *Younger* principles did not apply (*i.e.*, if no state proceeding were deemed pending), the traditional abstention doctrine set forth in cases from *R. R. Commission v. Pullman*, 312 U. S. 496 (1941) to *Bellotti v. Baird*, 428 U. S. 132 (1976) would necessitate the federal court's staying its hand while the state courts were given the opportunity to so construe the statute.[20]

Section 44-41-20 (c) proscribes abortions "[d]uring the third trimester of pregnancy" (defined in § 44-41-10 (k) as beginning with the twenty-fifth week after conception) unless the attending physician certifies that it is necessary to protect the life or health, including mental health, of the mother.[21] Although the statute read in its most literal sense would appear to conflict with language in the holding of

[16] See *Hicks*, where it was noted that no inference of bad faith may be drawn from the enforcement of an unconstitutional statute. "Otherwise, bad faith and harrassment would be present in every case in which a state statute is ruled unconstitutional and *Younger v. Harris* would be swallowed up by its exception." 422 U. S. 332, 352.

[17] "Under *Younger*, abstention may be required if the state prosecution is under a statute of only questionable constitutionality, but *Younger* makes it plain that the bad faith or harrassment exception is applicable when the state criminal proceeding is under a state statute which is 'flagrantly and patently violative of express constitutional prohibitions * * *.'" App. A, p. 6a.

[18] The court seems to say that it is only invalid as applied (App. A, p. 4a); but if this is the case, the court should have abstained, because inferably the statute was not unconstitutional "in whatever matter and against whomever. . . ."

[19] In *Roe v. Wade*, 410 U. S. at 126-127, the court refused to enjoin a state prosecution under the Texas abortion statute which was declared unconstitutional in every respect.

[20] As in *Baird*, the state's highest court has a rule (South Carolina Supreme Court Rule 20(1)) which permits it to take original jurisdiction of cases in which, inter alia, "the public interests are involved." *Id.* While this is not a rule for the certification of issues from the federal courts as in Massachusetts, it has been liberally invoked by the State Supreme Court, most recently in a case in which the Federal District Court abstained pursuant to *Pullman*. *University of South Carolina v. Batson*, No. 78-014, South Carolina Supreme Court (involving state university's mandatory retirement age).

The need for abstention under the *Pullman* doctrine (which arises only if no state proceeding were pending) also means that the lower court should not in any event have permanently enjoined the prosecutor from acting. A temporary injunction pending state court interpretation of the statute in a separate civil action would have protected Dr. Floyd without simultaneously precluding all enforcement of the statute against physicians who might perform post-viability abortions. (No other physician has sought declaratory relief concerning the statute's constitutionality and if a prosecution is pending against Dr. Floyd, he may not bring an independent declaratory judgment action in the role of a "potential future defendant." *Roe*, 410 U. S. at 126).

[21] The section also contains spousal consent and consulting-physician requirements which were held invalid in a separate portion of the opinion dealing with matters not necessary to the prosecution (App. A, p. 7a). As noted above (p. 2), these determinations have not been appealed.

Planned Parenthood v. Danforth,[22] the state court would not be confined to such a reading in affording the statute a constitutional construction; *see, Boehning v. Indiana State Employees Ass'n*, 423 U. S. 6, 7 (1975); *Lake Carriers Ass'n v. MacMullan*, 406 U. S. 498 (1972); *see also, U. S. v. Thirty-Seven Photographs*, 402 U. S. 363 (1971; federal statute). In addition, the state court in construing the statute would have before it a statutory definition of viability which is practically a verbatim quotation from *Roe v. Wade*. § 44-41-10 (l) provides:

> Viability means that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty-fourth week of pregnancy.

With the concept of viability thus clearly spelled out in the statute, the state court could limit the prohibition of § 44-41-20 (c) to post-viability abortions by construing the word "during" in "during the third trimester" to mean "at some point in the course of," i.e., the point after viability, rather than the more common (but not the exclusive) meaning which implies "throughout the entire time of." This meaning has been given to the word in a number of contexts (*see, e.g. American Linseed Co. v. Eberson*, 126 Mo. App. 426, 104 S. W. 121 (1907) (involving interpretation of a contract); *Christie Lowe and Heyworth v. Patton*, 148 Ala. 324, 42 So. 614 (1906) (interpretation of a contract); *Kiddle v. Kiddle*, 90 Neb. 248, 252, 133 N. W. 181 (1911) (interpretation of a statutory provision, "during its pendency" means "any time from the commencement of the

[22] "In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period." 428 U. S. 52, 64.

suit until and including the final order of dismissal. . ."); *U. S. v. Ammerman*, 176 F. 635, 636 (1910); (indictment for perjury).

The availability of this construction to the state courts suggests that this is a "paradigm case for abstention," *Lake Carriers' Ass'n v. MacMullan*, 406 U. S. 498, 510 (1972) because "the challenged state statute is susceptible of 'a construction by the state courts that would avoid or modify the (federal) constitutional question.'" *Id.* Where a state proceeding is pending as here, *Younger* principles compel the application of such abstention principles *a fortiori*.

Moreover, the draftsman of the act, whose deposition is in evidence, testified that the statute was not intended to prohibit the abortion of nonviable fetuses, even if such abortions were performed in the third trimester:

> [A]s I saw it, the viability requirement of [§ 44-41-10 (l)] said a legal presumption is created that viability occurs no sooner than the 24th week which leaves open the alternative that if a child is delivered, let's say, from 24 to 28, the fetus is not viable then you still have that legal defense available to you although it was a third trimester abortion, and you did not have to concern yourself with was it viable or not viable. *It is not presumed viable.* In other words, it is not presumed viable if it happens in the first two trimesters.[23]
>
> Saleeby Dep., p. 17 (emphasis added).

As the draftsman later testified, a physician who aborts after the 24th week might be subject to *prosecution*;[24] but

[23] This testimony was given in September, 1975, almost a year before this Court's decision in *Danforth*, and at a time when it was by no means certain that a state could not create a presumption that viability occurred after a set number of weeks. Nevertheless, the draftsman did not attach that presumptive effect to the statute.

[24] "Q. [By Mr. Lucas]: But if the physician has a case of a patient who is 26 weeks, for example, and he goes ahead and does the abortion thinking there is not a viable fetus. He is nonetheless liable to criminal prosecution, is he not?

A. For not complying with what was written to be a reasonable restriction on that. In that case then he would be subject to prosecution because he didn't comply with regulations." Saleeby Dep., p. 42.

his remarks quoted above indicate that nonviability would be a complete defense. Even before the need for a construction of the statute to prohibit only post-viability abortions became certain (i.e., before *Danforth*), the physician probably would have faced no greater likelihood of prosecution than one who performed an abortion under the Missouri statute approved in *Danforth,* for instance. It is thus apparent that the statute may be construed in accordance with *Roe,* and that the lower court erred in not abstaining under either *Younger* or under traditional abstention doctrines.

D. **The application of the law of homicide to this case is a question of state law.**

In this case, as already noted, there is an abundance of evidence that the fetus in question was viable when aborted. When it was born alive, moreover, it became a "person", as *Roe v. Wade,* 410 U. S. at 158, 161, 162, itself implies. The possible viability of the fetus in itself puts the case beyond the parameters of *Roe,* which limited the states' power to proscribe abortions (except therapeutic abortions) only before viability.[25]

The only question which the homicide indictment presents, therefore, is whether homicide can be predicated on injuries inflicted before birth. This is essentially a state-law question involving the definition and classification of possible criminal acts. *Roe* extends protection to postviable fetuses, whether deemed "persons" or not, and whether they survive the abortion procedure or not. If a state may prohibit nontherapeutic acts harmful to postviable fetuses, the state may also define such acts as a crime if it does so rationally.

[25] If a physician *thought* a fetus to be previable but it was nevertheless born alive, the reasonableness of the belief would presumably determine whether a prosecution were to be brought and what its chances of success would be.

The rule that a prenatal act resulting in the eventual death of a liveborn infant constitutes homicide is to be found in the common law.[26] *See, e.g., R. v. Brain,* 6 Car. & P. 350, 172 Eng. Rep. 1272 (1834); *R. v. West,* 2 Car. & K. 784, 175 Eng. Rep. 329 (1848); *Clarke v. State,* 117 Ala. 1, 23 So. 671 (1898); *Morgan v. State,* (48 Tenn. 417, 256 S. W. 433 (1923)), although the states have not unanimously adopted the rule.[27] *See, e.g., Commonwealth v. Edelin,* 359 N. E. 2d 4, 12 (1976). Unlike the numerous abortion statutes which were enacted in the mid-nineteenth century at least partly to protect the mother's health, *Roe,* 410 U. S. at 148-158, the common law homicide doctrine appears to have been grounded in large part on the fact that a "person" had been killed: live birth is the basis on which the doctrine turns.[28] The cases and commentators make little or no mention of the mother's health.

The lower court's brief conclusion as to the homicide indictment, like its conclusions about the prosecution for abortion, was based on an assumption that the fetus was not viable. Because this is not necessarily the case, and because no case has held that the Constitution precludes a homicide prosecution under these facts, the state court under either *Younger* or *Pullman* should determine whether the common law of homicide will be applied.

[26] Apparently no South Carolina case has reached the issue although murder is a common law offense, *State v. Judge,* 208 S. C. 497, 38 S. E. 2d 715 (1946).

[27] When these cases were decided, abortion was also a crime under the statutes of the respective jurisdictions. See 43 Geo. 3, Ch. 58 (1803); Ala. Acts. ch. 6 § 2 (1840-1841); Tenn. Acts. ch. CXL, §§ 1, 2 at 188-189 (1883).

[28] See, *e.g. Rex v. Brain, supra:* "A child must be actually in the world in a living state to be the subject of murder."

CONCLUSION

For the foregoing reasons, it is submitted that this Court has jurisdiction over the appeal, that the lower court has significantly abridged the State's interest in viable fetuses and in its court proceedings, and that the case should be set for plenary review.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[FILED
November 4, 1977
MILLER C. FOSTER, JR., Clerk]

Civil Action No. 75-1481

JESSIE J. FLOYD, M.D., PLAINTIFF,

versus

JAMES C. ANDERS, Solicitor of Richland County,
DEFENDANT

THREE-JUDGE COURT

Before HAYNSWORTH, Chief Circuit Judge, RUSSELL, Circuit Judge, and CHAPMAN, District Judge

---

HAYNSWORTH, Chief Circuit Judge:

In this action, a physician specializing in abortions sought to enjoin his prosecution in a state court on charges of committing an illegal abortion and of murder.

At the time the complaint was filed, the state prosecutor was actively seeking indictments arising out of the death of a male child twenty days after its delivery as a result of an abortion. The grand jury voted to return an indictment for murder and an indictment for performing an illegal abortion on the same afternoon that the single district judge, after a hearing, issued a temporary restraining order, but the indictments were not returned in open court until the next day.

I.

At the outset we are met with the contention by the defendant that under the doctrine of *Younger v. Harris*, 401 U. S. 37, we should abstain. Here, the federal complaint was filed before the indictments, and the temporary restraining order issued on the same afternoon during which the grand jury voted to return the indictments and the day before the indictments were actually returned in open court, so the literal holding of *Younger* is inapplicable. The defendant contends, however, that the principle applies since no "proceeding of substance on the merits" had taken place in the district court before the prosecution was commenced. *Hicks v. Miranda*, 422 U. S. 332. But *see, Doran v. Salem Inn*, 422 U. S. 922. One would suppose that the actual issuance of a temporary restraining order, after a hearing, was a proceeding of substance in the district court within the meaning of *Hicks*, but we need not stand on that ground, for it clearly appears that the state prosecutor was not proceeding in good faith, in the legal sense of the well-established exception to *Younger v. Harris*.

II.

This controversy grew out of a grisly and gruesome business.

Louise, a young, pregnant woman wished an abortion because her expectancy interfered with her hopes and plans to go to college. In July 1974, she went to plaintiff's clinic where, according to the affidavit of the plaintiff's nurse, Louise told the nurse that she was in the twelfth week of her pregnancy and gave the nurse $175, the amount of the plaintiff's fee for an abortion. The nurse checked Louise's blood pressure and pulse and administered pre-operative medication. An "instrument technician," employed by the plaintiff, escorted Louise to the "procedure room." There Louise was examined by Dr. Floyd, who determined that she was in the twentieth week of her pregnancy, not the twelfth, and that the abortion could not be accomplished by the currettement procedure which had been contemplated by the nurse.

According to the nurse's affidavit, Louise was visibly upset when told the abortion could not be accomplished in the clinic and that to accomplish it in the hospital would cost approximately $450, rather than $175, since the hospital's charges must be included. She was given a refund of $150 out of the $175 she had paid, but she did not have $450.

A week and one-half later, Louise telephoned the nurse and informed her that she had procured the necessary money, and she was given an appointment for a checkup by Dr. Floyd on August 21. Louise failed to keep that appointment, but was admitted to the hospital on September 3.

The next day, five weeks after his estimate of the fetal age from the time of conception as being twenty weeks, Dr. Floyd injected prostaglandin into Louise's uterus which later caused successive contractions and expulsion of the fetus.

The male fetus was alive at the time of delivery. Under the care of the hospital personnel, he continued to live for twenty days. This suggests that Dr. Floyd's estimate that Louise was in the twenty-fifth week of her pregnancy at the time of the abortion was accurate. Seemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb, but he did have the capacity to live for twenty days, as he did.

When an abortion occurs in the early weeks of pregnancy so that the fetus may be thought not to be alive once it was expelled from the womb or so that it dies in a moment and without a murmur, there may be little cause for revulsion. It seems quite different when an abortion is performed when the child has long since quickened and comes into the outside world with a strong heart beat and its lungs functioning. Differences are aggravated when it takes the child three weeks to die.

III.

In the circumstances of this case, it may be thought that the Constitution would permit a state some measure of discretion in regulating or proscribing late-term abortions without regard to viability, which may be impossible to determine when the child is in the womb. The Supreme

Court has clearly decided, however, that the state has no such discretion and that a state statute such as South Carolina's, which proscribes abortion after the twenty-fourth week of conception,[1] is unconstitutional in its application if the aborted fetus is not viable.

In *Roe v. Wade,* 410 U. S. 113, and *Doe v. Bolton,* 410 U. S. 179, the Supreme Court clearly stated the constitutional right of the expectant mother to terminate her pregnancy at any time up until the moment the child becomes viable. Solely in the interest of the health of the mother, it is subject to some regulation by a state during the mid trimester and the first part of the third trimester before viability as to such things as to who may perform abortions and where. Otherwise, the right of the mother to rid herself of an unwanted fetus is comparatively unfettered. That choice, said to spring from a right of privacy or of personhood or from her right to determine her own lifestyle, is surely one of great importance to her. It is so personal to the woman that it is said by the Supreme Court the state may not constitutionally encumber it with requirements of the consent of a husband, if there is one, or of parents, if the mother is young and unmarried. Indeed, the Supreme Court has clearly held that the state may not require a physician who has agreed to perform the abortion to consult another physician. The choice is solely that of the woman with such advice as she seeks or receives from the physician she chooses.[2]

In *Roe v. Wade,* 410 U. S. 113, the Supreme Court explicitly held that until a child becomes viable, the state's only interest in regulating abortions stems from its concern with the mother's health. Until that time, but after the first trimester, the state may regulate the conditions under which abortions may be performed, but only as those conditions relate to the health of the mother. Until the child is viable, the mother's constitutionally protected right to choose to

[1] 33 S. C. Code Ann. 682, *et seq.*

[2] The opinions of the Supreme Court suggest an expectation that the woman's decision would be an informed one made after receiving from her physician advice that was both professional and paternalistic. From all that is disclosed in the affidavits in this case, Louise received no advice from the physician until, after the administrations of the nurse, she arrived in the "procedure room."

terminate her pregnancy or not to do so must be allowed by the state to prevail over any interest it may have in the preservation of fetal life. Indeed, the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the Fourteenth Amendment. In *Planned Parenthood of Central Missouri c. Danford,* [sic] 428 U. S. 52, 64, the Supreme Court explicitly said that viability of the child is a medical concept to be determined by the attending physician, and that a legislature may not place it at a "specific point in the gestation period."

This prosecution was begun before *Planned Parenthood,* but after *Roe v. Wade. Roe v. Wade* itself, however, made it clear that proscription of abortions was impermissible before the child became viable. The Court's notice of the fact that viability generally occurs around the twenty-eighth week of pregnancy, though it may occur sooner, made it clear that the Court was treating the question of viability as one of fact, thus preventing legislatures from arbitrarily fixing a particular date for viability. Viability must, under *Roe,* be determined on a fetus by fetus basis.

Thus, at the time these indictments were sought against Dr. Floyd, it should have been obvious to the prosecutor that there was no possibility of his obtaining a conviction that could have been constitutionally sustained. The difficulty was that the prosecutor had not read the opinion in *Roe v. Wade.* He had read about it in a magazine, and he had a digest of it prepared by a first-year law student which, in several respects, was quite misleading.

We cannot fault the prosecutor for thinking that it would not be unreasonable for a state to proscribe all abortions after the twenty-fourth week following conception. Some fetuses, the Supremt Court said in *Roe v. Wade,* attain viability by that time. Whether or not a child is viable may be difficult to ascertain prior to delivery, and the twenty-fifth week approaches the twenty-eighth week when most children do become viable, if not viable earlier. Thus, we need not upbraid the prosecutor for supposing that the Constitution reasonably might leave to the states some area of discretion in proscribing abortions at a time

when all fetuses are approaching viability, and when some have actually attained it.

The prosecutor, however, was chargeable with knowledge of what *Roe v. Wade* actually held, and he was not entitled to proceed on the basis of what he supposed the law to be without having read what the Supreme Court had said. Had he but read the opinion for the majority in *Roe v. Wade,* he would have known that the fetus in this case was not a person whose life state law could legally protect. If a state may not legislate for the protection and preservation of the life of such a fetus, it surely cannot make the surgical severance of the fetus from the womb murder under state law. But the prosecutor here sought and obtained an indictment for murder as well as an indictment for performing an illegal abortion, when that, too, was clearly foreclosed by *Roe v. Wade.*

IV.

Since the prosecutor was chargeable with knowledge of what the Supreme Court had done and said in *Roe v. Wade,* his decision to proceed to seek and obtain indictments of Dr. Floyd, in the face of that knowledge, cannot have been in good faith. Even if the indictments had been returned before the commencement of this proceeding, *see Younger v. Harris,* 401 U. S. 37, or even if the issuance of a temporary restraining order following a hearing was not regarded as a proceeding of substance in this court, *see Hicks v. Miranda,* 422 U. S. 332, abstention would be inappropriate and impermissible since the prosecution itself is not being pursued in good faith. *Kugler v. Helfant,* 421 U. S. 117. Under *Younger,* abstention may be required if the state prosecution is under a statute of only questionable constitutionality, but *Younger* makes it plain that the bad faith or harrassment exception is applicable when the state criminal proceeding is under a state statute which is "flagrantly and patently violative of express constitutional prohibitions • • •."[3] This was reiterated in *Kugler.* In the face of the Supreme Court's holding in *Roe v. Wade,* there was no basis for a reasonable expectation that a valid conviction of Dr. Floyd might be obtained either upon the

[3] *Id.* at 53.

indictment for murder or upon the indictment for performing an illegal abortion. That is enough to bring this case within the *Younger* exception.

V.

The South Carolina anti-abortion statute[4] also requires that the physician, before performing an abortion, consult other physicians, and there are requirements for obtaining the consent of the husband of a married woman and of the parents or guardian of a minor.[5] While not indicted for violating any such provisions, Dr. Floyd seeks a declaration of their unconstitutionality. Without such a declaration, he may be exposed to further proceedings or harrassment. Thus, he is entitled to such a declaration.

The provision for physician consultation was expressly declared unconstitutional in *Doe v. Bolton,* and comparable provisions for obtaining spousal and parental or guardian consent were expressly declared unconstitutional in *Planned Parenthood.* Thus, Dr. Floyd may not be proceeded against under any of those provisions.

VI.

With the filing of this opinion, we assume that the pending indictments will be dismissed, and that there will be no further attempt to enforce South Carolina's anti-abortion statute to the extent that it is now declared to be in violation of the Constitution of the United States. If it otherwise appears within thirty days of the filing of this opinion, an appropriate decree will be entered.

[4] S. C. Code § 32-682(c).
[5] S. C. Code § 32-683(b).

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1979 of the Revised Statutes of the United States, 42 U. S. C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Code of Laws of South Carolina, 1976:

§ 44-41-10 (formerly § 32-681, 1962 Code, as amended):

As used in this chapter:

(a) *"Abortion"* means the termination of human pregnancy by any act, device, instrument, procedure, medicine, prescription or substance administered to or prescribed for a pregnant woman by any person, including the pregnant woman, with an intention other than delivery of a viable birth or removal of a dead fetus.

(b) *"Physician"* means a person licensed to practice medicine in this State.

(c) *"Department"* means the South Carolina Department of Health and Environmental Control.

(d) *"Hospital"* means those institutions licensed for hospital operation by the Department in accordance with the provisions of § 44-7-310 and which have also been certified by the Department to be suitable facilities for the performance of abortions.

(e) *"Clinic"* shall mean any facility other than a hospital as defined in subsection (d) which has been licensed by the Department, and which has also been certified by the Department to be suitable for the performance of abortions.

(f) *"Pregnancy"* means the condition of a woman carrying a fetus or embryo within her body as the result of conception.

(g) *"Conception"* means the fecundation of the ovum by the spermatozoa.

(h) *"Consent"* means a signed and witnessed voluntary agreement to the performance of an abortion.

(i) *"First trimester of pregnancy"* means the first twelve weeks of pregnancy commencing with conception rather than computed on the basis of the menstrual cycle.

(j) *"Second trimester of pregnancy"* means that portion of a pregnancy following the twelfth week and extending through the twenty-fourth week of gestation.

(k) *"Third trimester of pregnancy"* means that portion of a pregnancy beginning with the twenty-fifth week of gestation.

(l) *"Viability"* means that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty-fourth week of pregnancy.

§ 44-41-20 (formerly § 32-682, 1962 Code, as amended):

Abortion shall be a criminal act except when performed under the following circumstances:

(a) During the first trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician pursuant to his professional medical judgment.

(b) During the second trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician in a hospital or clinic certified by the Department.

(c) During the third trimester of pregnancy, the abortion is performed with the pregnant woman's consent, and

if married and living with her husband the consent of her husband, in a certified hospital, and only if the attending physician and one additional consulting physician, who shall not be related to or engaged in private practice with the attending physician, certify in writing to the hospital in which the abortion is to be performed that the abortion is necessary based upon their best medical judgment to preserve the life or health of the woman. In the event that the preservation of the woman's mental health is certified as the reason for the abortion, an additional certification shall be required from a consulting psychiatrist who shall not be related to or engaged in private practice with the attending physician. All facts and reasons supporting such certification shall be set forth by the attending physician in writing and attached to such certificate.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 75-1481

JESSIE J. FLOYD, M.D., PLAINTIFF,

versus

JAMES C. ANDERS, Solicitor of Richland County,
DEFENDANT

ORDER

The Court has determined that an injunction is necessary to carry out and enforce the Order of the Three-Judge Court recently filed.

IT IS, THEREFORE, ORDERED that James C. Anders, the Solicitor for the Fifth South Carolina Judicial Circuit, be and he is hereby permanently enjoined from proceeding to prosecute the plaintiff Jessie J. Floyd, M.D., on any of the charges contained in the indictment returned August 29, 1975 charging Dr. Floyd with violation of the South Carolina Abortion Law, and said James C. Anders is further enjoined from seeking any new indictment against Dr. Floyd based upon the facts giving rise to and set forth in said indictment.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

December 20, 1977,
Columbia, South Carolina.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[ORIGINAL FILED
January 10, 1978
MILLER C. FOSTER, JR., Clerk]

Civil Action No. 75-1481

JESSE J. FLOYD, M.D., PLAINTIFF,

versus

JAMES C. ANDERS, Solicitor of Richland County, his agents, successors, and those acting in concert with them, DEFENDANTS.

NOTICE OF APPEAL

To GEORGE C. KOSKO and ROY LUCAS, Attorneys for Plaintiff:

PLEASE TAKE NOTICE that the defendant, James C. Anders, hereby appeals to the Supreme Court of the United States from the order entered on December 20, 1977, enjoining him from prosecuting an indictment in the Richland County Court of General Sessions.

DANIEL R. McLEOD,
Attorney General,
C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,
KENNETH P. WOODINGTON,
Assistant Attorney General,
P. O. Box 11549,
Columbia, South Carolina 29211,
By: /s/ KENNETH P. WOODINGTON,
Attorney for Defendants.

January 9, 1978.
TRUE COPY
Test:
MILLER C. FOSTER, JR., Clerk,
/s/ MARGARET TRUESDALE,
By: Deputy Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS,

Appellant,

v.

JESSE J. FLOYD, M.D.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
COLUMBIA DIVISION

MOTION TO DISMISS OR AFFIRM
AND
BRIEF IN SUPPORT OF MOTION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
COLUMBIA DIVISION

MOTION TO DISMISS OR AFFIRM

Pursuant to U.S. Sup. Ct. Rule 16, appellee respectfully moves the Court to dismiss this appeal for want of a substantial federal question or, in the alternative, to affirm the judgment below.

Respectfully submitted,

ROY LUCAS
CAROLE BASRI
GEORGE C. KOSKO
Attorneys for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS,

Appellant,

v.

JESSE J. FLOYD, M.D.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
COLUMBIA DIVISION

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Appellee respectfully submits this brief in support of the motion to dismiss or affirm.

JURISDICTION

Dr. Floyd seeks dismissal of this appeal because it presents no new or substantial federal question. *Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973). The questions of abstention and viability raised by the appellant were well settled by this Court in

Roe v. Wade, 410 U.S. 113 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In the alternative, appellee Floyd requests this Court to affirm the decision of the three-judge court summarily. *See Planned Parenthood, supra; Sendak v. Arnold*, 429 U.S. 968 (1976), *aff'g mem.* 416 F. Supp. 22 (S.D. Ind.)(per curiam); *Coe v. Gerstein*, 428 U.S. 901 (1976), *aff'g mem.* 517 F.2d 787 (5th Cir. 1975).

The district court had incontestable jurisdiction to determine the merits of Dr. Floyd's claim. On its face the South Carolina abortion statute, S.C. Code §44-41-20 (formerly §32-682(c), 1962 Code as amended), unconstitutionally restricts abortion through its third trimester-25 week clause, in direct violation of *Planned Parenthood v. Danforth, supra*, and *Roe v. Wade, supra.*

QUESTIONS PRESENTED

I

Whether the federal district court had jurisdiction to permanently enjoin the threatened state prosecution of Dr. Floyd?

II

Whether the third trimester-25 week clause of the South Carolina Abortion Law, S.C. Code §44-41-20 (formerly §32-682(c), 1962 Code as amended), abridges the Fourteenth Amendment right of privacy, is inconsistent with the express holdings of *Roe v. Wade*, and *Planned Parenthood v. Danforth*, and is not supported by any compelling medical evidence?

III

In any case, was the abortion of Louise Doe protected by the holdings of *Roe v. Wade* and *Planned Parenthood v. Danforth*?

A. Whether the Doe abortion was pre-viable and thus protected as a matter of law?

B. Whether the Doe abortion, even if viable, was protected by the mental health qualification of *Roe v. Wade*?

STATEMENT OF THE CASE

Prosecutor Anders sought, in August of 1975, to indict physician Floyd for murder and illegal abortion following a pregnancy termination about a year earlier at Richland Memorial Hospital, Columbia, South Carolina. The abortion resulted in a live birth. As a result, the aborted fetus was promptly taken to a neonatal intensive care unit (Wall Dep. at 3), where it remained for three weeks of heroic medical efforts. This fact contradicts Prosecutor Anders' claim that "the decision [of the three-judge court] denies protection of law to infants born alive after an abortion . . ." (Jurisdictional Statement [hereafter J.S.] at 10). Here, no protection was denied the fetus once it was born alive.

Further, Prosecutor Anders knew about *Roe v. Wade*, 410 U.S. 113 (1973), and that it was controlling. However, he admitted that he voluntarily limited his knowledge of *Roe*. (Anders Dep. at 13). As the three-judge court found, "[h]e had read about it in a magazine [*Newsweek*], and he had a digest of it prepared by a first-year law student, which, in several respects, was quite misleading." (J.S. at 5a; *Floyd v. Anders*, 440 F. Supp. 535, 539 (D.S.C. 1977)).

After full briefing, argument, and an adverse decision on the merits as to four sections of the South Carolina

abortion law, the State conceded error on three legal points: spousal consent, parental consent, and multiple physician consultation. (J.S. at 2). However, the State has appealed the injunction permanently enjoining the attempted indictments for abortion and felony murder.

ARGUMENT

I.

THE FEDERAL DISTRICT COURT HAD JURISDICTION TO PERMANENTLY ENJOIN THE STATE PROSECUTION OF DR. FLOYD.

A. The Abstention Doctrine Is Inapplicable Where No Proceeding Is "Pending" In State Court.

Since *Ex Parte Young*, 209 U.S. 123 (1908), it is clear that under certain circumstances a federal court can enjoin enforcement of a state statute on federal constitutional grounds. However, where there is an "ongoing" state prosecution, federal court intervention is limited by "notions of comity and federalism." *Younger v. Harris* 401 U.S. 37, 44-45 (1971). Conversely, when no state criminal proceeding is pending, *Younger, supra*, and its companion cases are fundamentally inapplicable. *Steffel v. Thompson*, 415 U.S. 452 (1974).

In the present instance, the *Younger* abstention doctrine does not apply, since no ongoing state proceeding existed before the federal court proceedings. A temporary restraining order was issued against Anders in federal court on the afternoon of August 28, 1975, one day after the action in federal court was filed and one day before the indictments were returned in state court. The three-judge court has characterized these events as follows:

> "At the outset we are met with the contention by the defendant that under the doctrine of *Younger v. Harris*, 401 U.S. 37, we should abstain. Here, the federal complaint was filed before the indictments, and the temporary restraining order issued on the same afternoon during which the grand jury voted to return the indictments and the day before the indictments were actually returned in open court, so the literal holding of *Younger* is inapplicable." (J.S. at 2a; *Floyd v. Anders*, 440 F. Supp. 535, 537 (D.S.C. 1977)).

While appellant Anders contends that an "ongoing state court proceeding" had commenced before the indictment was returned, he fails to consider several decisions which demonstrate why the abstention doctrine is inapplicable.

In *Ex Parte Young, supra*, this Court stated;

> "When [in state court an] indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal Court, the latter court, having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed." 209 U.S. at 161-162.

Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2 (1965), also states:

> "Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint . . .no state 'proceedings' were pending . . . ."
>
> "Nor are the subsequently obtained indictments 'proceedings' against which [federal] injunctive relief is precluded . . . ."

Most recently in *Judice v. Vail*, 430 U.S. 327 (1977), this Court abstained where it was clear that appellees, judgment creditors, had an ample opportunity to present their constitutional claims at pre-existing, ongoing state proceedings. As this Court noted, their failure to avail themselves of such opportunities, in Vail's case for nine months, during which a deposition was scheduled and several hearings held, does not negate the fact that "ongoing" civil enforcement proceedings existed. 430 U.S. at 330. Thus, where "ongoing" state proceedings beyond the complaint stage have or are occurring, *Younger* abstention may apply. Conversely, where no complaint in state court has been filed, as here, no "ongoing" proceeding exists, and *Younger* abstention does not apply.

Two recent lower court decisions also consider pendency in state courts for purposes of abstention. In *Four Unnamed Plaintiffs*, 424 F. Supp. 357 (D. Mass. 1976), *reversed on other grounds*, 550 F.2d 1291 (1st Cir. 1977), four prisoners were removed to segregated facilities without benefit of notice or a hearing on the charges precipitating removal. The district court addressed the arguments against federal intervention as follows:

> "[I]t has been suggested that federal court intervention in this situation is inappropriate out of a concern for comity. Defendants, as well as the Norfolk County District Attorney, assert that any relief granted to plaintiffs by this court will interfere with *an on-going state administrative and criminal investigation.* Defendants refer to the equitable abstention doctrine, evolving from *Younger v. Harris*, 401 U.S. 37 (1971), by which a federal court should not interfere with an on-going state criminal proceeding." 424 F. Supp. at 362. (Emphasis added.)

However, the district court found *Younger* inapplicable:

> "The court does not interpret the doctrine to require federal courts to avoid interference with state criminal or administrative proceedings in the *pre-indictment* stage, as in the case here." 424 F. Supp. at 362. (Emphasis added.)

And, in *Penthouse International v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), a temporary restraining order was issued prior to state prosecution of certain magazines.

> "The second and most important limitation upon *Younger* is a temporal one which provides that if there is a justifiable case or controversy which is not yet the subject of state court proceedings, federal intervention is permitted since the state has not yet chosen to act *and therefore federal action could not offend notions of comity and federalism.* In temporal terms, the instant action is precisely in the foregoing *'post act-pre prosecution' procedural posture because plaintiffs have vended the subject magazines but have not yet been prosecuted in state court for so doing.*" 436 F. Supp. at 1247. (Emphasis added.)

The court added:

> "since *no indictment issued* and since the instant proceedings are now far more than embryonic, we would not surrender jurisdiction here, even if indictments were now forthcoming." 436 F. Supp. at 1247, n. 13. (Emphasis added.)

In the present case, the federal complaint was filed more than an entire day before the state grand jury convened; the federal district court heard substantial argument on the merits of a restraining order one day before the indictment was returned in open court.

If Appellant Anders had obeyed the order of the court and withdrawn the indictment, it would never have been presented in open court, and there would be no *Younger* question. In any event, the federal restraining order came before the state proceeding. Appellant Anders admitted this in his deposition. When asked if "Dr. Floyd was not charged until the indictment was published . . .," Anders stated: "That's correct." (Anders Dep. at 37). If this is true, there was no pending proceeding within the meaning of *Younger*.

Several analogies are useful. A decision by this Court is secret and not effective until published. Any vote may be changed prior to publication. Similarly, a jury verdict has no effect until announced in open court. Cases are frequently settled and/or withdrawn during the deliberations of courts and juries. After the external action is taken, the prior deliberations are moot and of no effect. Anders cannot elevate an unpublished grand jury vote to an "ongoing state proceeding." The vote was secret. No one knows the numbers in favor or even the time of day of the vote.

B. The Abstention Doctrine Is Inapplicable Where A "Proceeding Of Substance" Occurred In Federal Court, Prior To Issuance Of The Indictments Against Dr. Floyd.

Appellant, based upon *Hicks v. Miranda*, 422 U.S. 332, 349 (1973), contended below that no "proceeding of substance" occurred in federal court prior to the commencement of state prosecution. Appellent's use of *Hicks* is misplaced for several reasons.

First, in *Hicks* the Court pointed out that appellees had already developed a substantial stake in the state proceedings, and, therefore, the *Younger* doctrine should be applied. The substantial stake that appellees had in *Hicks*

does not exist in the present case. In *Hicks*, two employees of a theater had been charged in Municipal Court and four copies of the allegedly obscene material had been seized, were being held, and had been declared to be obscene and seizable by the Superior Court. In the present case, no state proceedings were initiated or completed involving the appellee, thus, no substantial stake or state involvement similar to that in *Hicks* existed at the time federal proceedings were held. Here there was not even a piece of paper or a state court file number.

Second, *Hicks* does not apply because in the present case, "proceedings of substance on the merits" did occur in federal court prior to the beginning of state proceedings. In *Hicks*, the appellees were formally charged prior to answering the federal case and prior to any proceedings whatsoever before the federal court. In contrast, in the present case, before the appellee was charged, a federal TRO hearing was held in which there was a detailed discussion of the merits of appellee's claims.

At page four of the transcript of the TRO hearing the Court asked:

> "THE COURT: Now why, Mr. Anders, is it not subject to *Roe v. Wade*?" Tr. at 4, Hearing August 28, 1975, before the Honorable Robert F. Chapman, *Floyd v. Anders*, Civ. No. 75-1481 (D.S.C.).

The parties then proceeded to argue and discuss the merits in great depth, comparing the S.C. abortion law language with the *Roe, supra*, 410 U.S. 113, holding.

On page 7 of the hearing transcript the Court discussed the possible inconsistency between the South Carolina statute and *Doe v. Bolton*, 410 U.S. 197 (1973), concerning the requirement of two physicians. The transcript continues a discourse on the merits, moving on page 19 to a discussion of the murder indictment in light of *Roe, supra*.

While the duration of the hearing is not recorded, the hearing lasted for about an hour (J.S. at 16), as long as the time allotted in this Court for full appellate arguments. This surely constituted "proceedings of substance on the merits," 422 U.S. at 349, within the dictum of *Hicks*. The TRO hearing transcript is as long as the memorandum brief of the state on the merits below.

Further, *Doran v. Salem Inn*, 422 U.S. 922 (1975), shows that federal injunctive relief was applied to protect against an imminently threatened invasion of federally protected rights. *Doran* upheld the issuance of an interim injunction where "[n]o state proceedings were pending against either [federal plaintiff] at the time the District Court issued its preliminary injunction." 422 U.S. at 930. The Court in *Doran* squarely held that "injunctions of future criminal prosecutions are . . . not subject to the restrictions of *Younger*." 422 U.S. at 930. Thus, *Doran* more clearly applies than *Younger* or *Hicks* since the temporary injunction is brought against a future criminal prosecution.

As the three-judge court in this case said:

> "The defendant contends, however, that the [abstention] principle applies since no 'proceeding of substance on the merits' had taken place in the district court before the prosecution was commenced. *Hicks v. Miranda*, 422 U.S. 332. But *see*, *Doran v. Salem Inn*, 422 U.S. 922. One would suppose that the actual issuance of a temporary restraining order, after a hearing, was a proceeding of substance in the district court within the meaning of *Hicks* . . . ." (J.S. at 2a; *Floyd v. Anders, supra*, 440 F. Supp. at 537.)

C. The Federal Court Has Jurisdiction to Enjoin A State Criminal Proceeding Brought In Bad Faith.

Even if *Younger, supra*, and *Hicks, supra*, are held to apply, the federal court could assert jurisdiction where, as here, the state prosecution has proceeded in bad faith and, in addition far-reaching irreparable injury to the appellee and his patients would occur.

Younger makes it plain that direct federal intervention in state proceedings is permissible upon a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54.

Further explanation of the "bad faith" exception was offered in *Kugler v. Helfant*, 421 U.S. 117 (1975), where this Court defined "bad faith" to mean "that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." 421 U.S. at 126 n. 6.

Appellee argues here that the three-judge court properly took jurisdiction where the state prosecution proceeded in "bad faith" and, in addition, far-reaching irreparable injury can be shown.

The fact of irreparable injury has never been challenged. If the state court is allowed to take jurisdiction, Dr. Floyd would definitely be prosecuted. The repercussions of this indictment in appellee's personal and professional life would be far-reaching. Additionally, there would occur a wholesale cutback of available midtrimester abortion services in South Carolina. Indeed, an unjustifiable cutback has already occurred. The Director of Obstetrics and Gynecology at Richland Memorial Hospital, Dr. Dennis, has testified that he has

imposed an 18-week limitation for abortions in his department (Dennis Dep. at 23). This limitation has been imposed in addition to the quota which already exists, limiting midtrimester abortions to four per week. (Dennis Dep. at 26). (J.S. at 5 n. 10). These limitations are particularly severe since no other hospital in South Carolina performs midtrimester abortions (Dennis Dep. at 54).

Solicitor Anders also could not have reasonably anticipated conviction of Dr. Floyd and is, therefore, chargeable with bad faith prosecution. First, Anders had constructive knowledge that the multiple physician requirement of the South Carolina abortion law is directly at odds with *Doe v. Bolton, supra,* a holding which appellant has conceded on appeal. (J.S. at 2, n.3). Second, Anders was on notice that the 25 week viability provision in the South Carolina abortion law was facially at odds with the 28 week general rule of *Roe* v. *Wade, supra,* which emphasizes physician discretion. (*See* Sec. II *infra.*). Third, there was no factual evidence from which to conclude that Dr. Floyd knowingly aborted a post-viable fetus. In fact the medical records indicate the very opposite. (*See* Sec. III A). Finally, the records known to appellant Anders showed pre-viability of the fetus, as well as the medical necessity for an abortion, to preserve the patient's mental health, regardless of length of pregnancy. (*See* Sec. III). In conclusion, Prosecutor Anders had no factual basis for proceeding under the patently unconstitutional South Carolina abortion statute.

Anders' bad faith is further evidenced by his decision to request and obtain a capital murder indictment against Dr. Floyd; his reliance upon a magazine (*Newsweek*) article for authority instead of *Roe v. Wade, supra*, or medical evidence; his failure to comply with the order to withdraw the indictment; and his disregard of substantial exculpatory evidence.

1. Anders' Request For A Murder Indictment Against Dr. Floyd

What Dr. Floyd openly and reasonably thought to be a lawful pre-viable 24-week therapeutic abortion somehow became the object of a murder indictment with capital consequences in the hands of appellant Anders. There is no rational answer to the question of how one can find murder when a fetus temporarily survives an abortion and is immediately treated with all heroic efforts in a neonatal intensive care unit. Appellant Anders had no support in law, facts, or theory for his charge of murder. This is clearly a case where "a prosecution has been brought without a reasonable expectation of obtaining a valid conviction," *Kugler v. Helfant,* 421 U.S. at 126 n.6 (1975); *Timmerman v. Brown,* 528 F.2d 811, 815 (4th Cir. 1975).

Preliminarily, there can be no murder unless an injury is inflicted upon a "person," causing his or her death. This prerequisite cannot even at the outset be met by the State. As this Court in *Roe v. Wade, supra,* 410 U.S. 113, observed, it is "doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus." 410 U.S. at 136. As pertains to American law, *Roe* specifically holds that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. Moreover, "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. In view of this very explicit language in *Roe*, which appellant Anders admittedly never did read (Anders

Dep. at 13), there was no basis for making a murder charge.[1]

There are, of course, no South Carolina cases or statutes on which appellant Anders could rely in charging murder. At his deposition, appellant Anders suggested that the felony murder doctrine was applicable, and that a 26-week fetus was a person for such purposes. (Anders Dep. at 10). That is a double bootstrap argument. Under *Roe* the fetus is not a person, and the underlying felony statute itself is inapplicable.

Further, prosecutor Anders acted in bad faith when he requested an indictment for murder as well as a criminal abortion against Dr. Floyd when, in fact, there was and is no evidence of criminal intent. This same issue was raised in *Commonwealth v. Edelin,* 359 N.E. 2d 4 (Mass. 1976), where the Supreme Judicial Court of Massachusetts reversed the manslaughter conviction of Dr. Edelin for performing a late-second trimester abortion. The Massachusetts appellate court held:

> "[F]ive Justices are agreed that there was insufficient evidence to go to a jury on the overeaching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the 'wanton' or 'reckless' conduct resulting in a death required for a conviction . . . [of manslaughter]." 359 N.E.2d at 5.

Further, the court stated:

> "[O]n any view of viability tenable under *Wade - Bolton*, there was no sufficient showing of reck-

[1]Appellant Anders admitted he had never read *Roe v. Wade* and knew nothing about *Doe v. Bolton* or the prevailing Fourth Circuit decision *Vuitch v. Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973). (Anders Dep. at 13). He did, however, state that in deciding to prosecute Jesse Floyd "*Newsweek* was significant to me . . . ." (*Id.* at 25).

> lessness in Dr. Edelin's prenatal conduct . . . His 'quo animus' turned on whether he believed in good faith that the fetus was not viable at the time of the operation and was not palpably unreasonable in this belief – a combination of an internal and an external standard of criminality . . . Of course manslaughter could not be supported by proof merely of a mistake of judgment, even if that was the result of negligence or gross negligence." 359 N.E. 2d at 13.

Anders' pursuit of criminal murder, as well as abortion, charges without evidence is the first major element of bad faith. As the three-judge court stated concerning the criminal murder indictment requested by Anders:

> "If a state may not legislate for the protection and preservation of the life of such a fetus, it surely cannot make the surgical severance of the fetus from the womb murder under state law. But the prosecutor here sought and obtained an indictment for murder as well as an indictment for performing an illegal abortion, when that, too, was clearly foreclosed by *Roe v. Wade.*" (J.S. at 6a; *Floyd v. Anders*, *supra*, 440 F. Supp. at 539).

2. Anders' Reliance Upon *Newsweek* Instead of *Roe v. Wade*, *Doe v. Bolton*, and Medical Evidence.

Appellant Anders admitted he had not read *Roe v. Wade*, 410 U.S. 113 (1973), but only a synopsis prepared by a first year law student. He knew nothing about *Doe v. Bolton,* 410 U.S. 179 (1973), which was not mentioned in the brief synopsis, and also knew nothing about the controlling decision in the Fourth Circuit, *Vuitch* v. *Hardy*, 473 F.2d 1370 (4th Cir. 1973) (per curiam). (Anders Dep. at 13).

Appellant Anders also did not know what this Court said in *Roe*, if anything, about "viability" (Anders Dep. at 14), did not seek an opinion on the constitutionality of the statute (Anders Dep. at 41), and did not even look at any medical textbooks or articles on the subject (Anders Dep. at 26) before seeking indictments. Prosecutor Anders, by his own admission, "read write-ups in *Newsweek* and that sort of thing . . ." (Anders Dep. at 25). He stated: "*Newsweek* was significant to me, reading that particular article on the Boston case up there . . . ." (Anders Dep. at 25). Asked to "recall any other written materials that you've relied upon in deciding to seek an indictment," Anders stated: "I don't recall any others." (Anders Dep. at 25).

The law student synopsis and memorandum, along with *Newsweek*, comprised the total legal research of Anders up to the time of his deposition on September 15, 1975. The handwritten synopsis was prepared by a freshman law student, Mr. McLean. (McLean Dep. at 6). *Doe v. Bolton* was not included in that synopsis because Mr. McLean had not read that far. (McLean Dep. at 10).

Solicitor Anders relied upon such materials to bring murder and illegal abortion charges. The synopsis does not even allude to the central question of "viability" but instead mentions "quickening," an old common law concept abandoned as not meaningful. The synopsis was clearly insufficient since it never reached the issues of viability and 25 weeks gestation. As the three-judge court concluded:

> "The prosecutor, however, was chargeable with knowledge of what *Roe v. Wade* actually held, and he was not entitled to proceed on the basis of what he supposed the law to be without having read what the Supreme Court had said. Had he but read the opinion for the majority in *Roe v. Wade*, he would have known that the fetus in this case was not a person whose life state law could legally protect." (J.S. at 6a; *Floyd v. Anders, supra*, 440 F. Supp. at 539).

The *Newsweek* article itself provides no basis for the felony charges. This article, appearing in the March 3, 1975, issue of *Newsweek*, concerned abortion and the Edelin case in Boston, not *Roe v. Wade, supra*. Its analysis is clearly more helpful to Dr. Floyd than to Prosecutor Anders. For instance, the article mentions that in *Roe*

> "the U.S. Supreme Court cited the medical literature and expert opinion to establish the usual time of viability at about 28 weeks . . . ." *Newsweek*, March 3, 1975, at 25.

Further, the article states "Physicians emphasize, however, that a live birth does not mean that a fetus is viable. Viability implies that the infant can survive outside the mother and grow to maturity." *Newsweek* at 24. Both of these *Newsweek* passages contradict Anders and suggest that the 25 week presumption of the South Carolina abortion law is unconstitutional.

Due in part to Anders' reliance only on the student-prepared synopsis and the *Newsweek* article, the three-judge court found that Anders acted in bad faith. Factually, the court determined:

> "The difficulty was that the prosecutor had not read the opinion in *Roe v. Wade*. He had read about it in a magazine, and he had a digest of it prepared by a first-year law student which, in several respects, was quite misleading." (J.S. at 5a; *Floyd v. Anders, supra*, 440 F. Supp. at 539).

3. Anders' Disregard of the Order To Withdraw the Indictment

There is evidence in the record to indicate Anders' indifference to the federal district court order to withdraw the indictment. Such indifference is an additional element of bad faith. As previously mentioned, at the close of the TRO hearing, appellant Anders was directed to withdraw the indictment from the grand jury if it had not been formally returned by that time. This he did not do, later claiming lack of authority.

The transcript shows the following:

> "THE COURT: If they have returned a True Bill you are then restrained from prosecuting. If they haven't returned a True Bill the thing to do is withdraw it . . ." Tr. at 30, Hearing, August 28, 1975.

The temporary restraining order also states:

> "ORDERED, that Defendant Anders withdraw the proposed indictment from the grand jury forthwith . . . ."

Anders did not even contact the grand jury foreman. Taylor Dep. at 5). Appellant never returned to district court to object to the order nor to explain his noncompliance. He never once cited a case or statute to support his refusal to act. Furthermore, widespread news coverage was given to the indictments.

Case law suggests that Prosecutor Anders deliberately refused to exercise authority which he knew he possessed. *State v. Charles*, 183 S.C. 190, 190 S.E. 466 (1937), held that the prosecutor has discretionary power on his own without state court approval to enter a *nol pros* prior to empanelment of a jury. If he possesses such power, he certainly could have obeyed the federal court order to withdraw the indictment. That is a lesser

included power reasonably inferred. The federal supremacy clause is also binding upon Anders.

4. Anders' Disregard of Overwhelming Exculpatory Evidence

Anders' disregard of overwhelming exculpatory evidence is the final element of bad faith. Prosecutor Anders knew and/or recklessly disregarded overwhelming medical evidence which showed that he could have no "reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. at 126, n.6. This conclusion is based on the notes in evidence of Lt. Cook, Chief Investigator for the Prosecutor.

Only one gynecologist other than Dr. Floyd had physically examined Louise Doe before the abortion, Dr. Kanitkar. According to his deposition (Kanitkar Dep. at 9, 10) and as ascertained by Lt. Cook, she was 16 or 17 weeks pregnant on July 19, 1974. That would be extrapolated to 23 or 24 weeks pregnant on September 6, 1974, two days after the abortion. This is well within *Roe and* the state statute.

Lt. Cook made the notation of "*16 or 17 weeks pregnant*" on his legal pad and even *underlined* it. He told appellant Anders about meeting with Dr. Kanitkar. (Cook Dep. at 68). Cook did not tell the grand jury (Cook Dep. at 72), and Anders did not call Dr. Kanitkar to testify. Through his investigation, Lt. Cook also found that Louise Doe gave 4/28/74 as her LMP date, first day of last menstrual period before pregnancy (i.e. two weeks before conception). Extrapolated to September, this gives a length of pregnancy under 17 weeks at the time of the abortion. Again, the dates are crucial exculpatory evidence. These facts were withheld from the grand jury by the prosecutor.

In addition, it is clear that *Roe v. Wade*, 410 U.S. at 165, holds that a state *must* permit post-viability abortions if necessary for the "health" of the woman, 410 U.S. at 165, and that "health" includes "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. at 191.

Yet, Prosecutor Anders and his agent Lt. Cook effectively suppressed and ignored highly probative evidence that an abortion was necessary for the psychological well-being of Louise Doe, regardless of the stage of pregnancy. The Social Worker's notes showed Louise Doe to be "very desperate," and "determine[d] to have an abortion." *Social Work Report on Louise Doe*, 7/25/74. Similarly, two nurses described Louise Doe as "very upset," and "depressed" about the pregnancy.

This apparent disregard by Anders of exculpatory evidence is a further indication of bad faith. Anders' reliance on fetal weights is not probative since this information is available only *after* the abortion is performed. Finally, fetal birthweights are not a conclusive indicator of the length of pregnancy because they show only what age the average fetus of that weight would be.

In conclusion, a reasonable study of the law should have shown prosecutor Anders that the pertinent sections of the South Carolina abortion law were inconsistent with *Roe v. Wade, supra*, and *Doe v. Bolton, supra*. Instead, he read *Newsweek*. Moreover, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), strengthens Dr. Floyd's case even more. Yet Anders persists in pressing this litigation.

Additionally, the medical history of Louise Doe conclusively showed a reasonable basis for estimating her length of pregnancy as within the law, and her mental

state justified an abortion in any event. Lt. Cook did not even add up the number of weeks Louise Doe was pregnant, a case of inexcusable neglect. As Chief Investigator on this case for Prosecutor Anders, Lt. Cook was the *sole* witness before the grand jury. He submitted no medical evidence and failed to mention crucial evidence vindicating Dr. Floyd. Thus, Anders' disregard of evidence exculpating Dr. Floyd provides the final element of bad faith.

II.

THE THIRD TRIMESTER - 25 WEEK CLAUSE OF THE SOUTH CAROLINA ABORTION LAW, S.C. CODE §44-41-20(c) (§32-682(c), 1962 CODE AS AMENDED), ABRIDGES THE RIGHT OF PRIVACY, IS INCONSISTENT WITH THE EXPRESS HOLDINGS OF *ROE v. WADE*, AND *PLANNED PARENTHOOD v. DANFORTH*, AND IS NOT SUPPORTED BY ANY COMPELLING MEDICAL EVIDENCE.

South Carolina Code §44-41-20(c) (formerly §32-681, 1962 Code, as amended), (J.S. at 9a - 10a), limits the circumstances "[d]uring the third trimester of pregnancy" when an abortion may lawfully be performed. The "third trimester of pregnancy" under §44-41-10(k), (J.S. at 9a), as incorporated in §44-41-20(c), is defined as "that portion of a pregnancy beginning with the twenty-fifth week of gestation." While §44-41-10(l)(J.S. at 9a) creates a legal presumption that viability occurs no sooner than the twenty-fourth week of pregnancy, this presumption does not mitigate the third trimester-25 week clause of §44-41-10(k), as incorporated in 44-41-20(c). Thus, the code specifies that the time when viability occurs is approximately 25 weeks, and proscriptions pertaining to abortion are imposed beyond that period.

Clearly, under *Planned Parenthood, supra*, 428 U.S. 52, the characterization of all fetuses as viable at twenty-

five weeks and the proscription of abortions beyond that stage is impermissible.

In *Roe v. Wade, supra*, this Court held that regulations which affect abortion-privacy rights are justified only if based upon a compelling state interests, and only if the statutes are narrowly drawn to express that state interest. 410 U.S. at 155. After the first trimester the State may regulate abortions only as to "maternal health," and after viability, the state has an interest in promoting the potentiality of the human life. As this Court stated:

> "[W]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." 410 U.S. at 163.

The Court, in *Roe, supra*, discussed "viability" noting:

> "viability is usually placed at about seven months (28 weeks) but may occur earlier even at 24 weeks." 410 U.S. at 160.

Until the point of viability, determined on a case by case basis, the woman's constitutionally protected right to choose to terminate her pregnancy must prevail over any interest the state may have in preserving the life of the fetus. As the three-judge court reasoned in this case, "Viability must, under *Roe* be determined on a fetus by fetus basis." (J.S. at 5a; *Floyd v. Anders, supra*, 440 F. Supp. at 539.)

The question of viability was discussed again in *Planned Parenthood v. Danforth, supra*. There, the Court held that viability is a medical concept to be determined by the attending physician as opposed to the courts or legislature. In reaffirming *Roe*, the Court said:

> "[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." 428 U.S. at 64.

The provisions in the South Carolina statute which fix the point of viability at 25 weeks directly contradict this Court's rulings that viability must be determined by a physician on a case by case basis. Thus, the statutory provisions which fix viability and proscribe abortions beyond that point must be found unconstitutional.

The South Carolina statute also lacks any rational medical foundation. As stated by Dr. Charles Hendricks, Chairman of Obstetrics/Gynecology at the University of North Carolina, based upon his extensive study on viability, "[a] presumption that every 25-week fetus will survive is simply untenable." (Hendricks Aff. at 4.)

Dr. Theodore King, Director of Obstetrics/Gynecology at Johns Hopkins, agrees: "A presumption that every 25 week fetus will survive is certainly, in my clinical experience, unreasonable." (King Aff. at 4.) Numerous other medical experts in affidavits and studies supported this view before the three-judge court. Thus, the court below determined that viability should be determined on a "fetus by fetus basis." (J.S. at 5a; *Floyd v. Anders, supra*, 440 F. Supp. at 539). *See also* Sec. III A, *infra*.

As stated earlier, regulations which affect fundamental rights are justified only if there is a compelling state interest. 410 U.S. at 155. To date, the state has not offered any compelling justification for its 25 week presumption of viability. The legislative draftsman of this law, Dr. Dudley Saleby, Jr., was deposed, and stated that he derived the 25 week figure from *Roe v. Wade*, not from any medical evidence. (Saleby Dep. at 37). As has

been shown, however, his analysis was a misinterpretation of *Roe*. He eventually admitted that the *Roe* opinion said nothing "about the third trimester." (Saleby Dep. at 42). In the absence of evidence demonstrating a compelling state interest, the South Carolina Code clearly does not pass constitutional scrutiny. Since the statute is invalid, this Court need not be concerned with differences, if any, between the Missouri and *Roe* definitions of viability.

III.

IN ANY CASE, THE ABORTION OF LOUISE DOE WAS PROTECTED WITHIN THE CONFINES OF *ROE v. WADE* AND *PLANNED PARENTHOOD v. DANFORTH*

A. The Louise Doe Abortion Was Pre-Viable As a Matter of Law

As the appellant admits in his brief (J.S. at 7), Dr. Floyd estimated Louise Doe's pregnancy to be approximately 20 weeks at the time of the clinic visit. This finding was independently corroborated by Dr. Kanitkar at the Gregg Street Health Department Clinic in the Family Planning Record, 7/19/74. Louise Doe gave a menstrual history to Dr. Kanitkar consistent with a pre-viable fetus in the Social Work Report, Clinic Continuation Sheet, and the Family Planning Record of Louise Doe. These were well documented and known to appellant Anders and his investigators. Anders, however, relied solely on the weight of the fetus, which was unknown and unknowable to Dr. Floyd prior to removal of the fetus from the womb. Thus, Dr. Floyd, applying his own best medical judgment, determined that the fetus was pre-viable and performed the abortion. This process of determining when a fetus is pre-viable for purposes of performing an

abortion was endorsed in *Planned Parenthood v. Danforth*, 428 U.S. at 61. This Court stated:

> ". . . the stage subsequent to viability, a point purposefully *left flexible for professional determination* and dependent upon *developing medical skill and technical ability*." 428 U.S. at 61. (Emphasis added)."

The requirements of flexibility for professional determination as well as developing medical skill and technical ability are two areas that Anders only briefly considers. For example, even if Dr. Floyd was able to determine fetal weight prior to the abortion, fetal weight still would not conclusively indicate when viability is reached. It would establish merely the range of gestation. Thus, a professional determination of viability must still be made. Expert affidavits submitted with appellee's motion show that a fetal weight of 1049 grams is not always over 25 weeks or post-viable as appellants presumed. Dr. Hendricks states, "it would be possible for an infant with a birth weight of 1049 grams actually to have represented a pregnancy of only 24 menstrual weeks gestation, or 22 weeks post-conception." (Hendricks Aff. at 5). Dr. King of Johns Hopkins agreed: "An infant that weights 1,050 grams at birth could be delivered from a pregnancy as short as 23 or 24 weeks in duration . . . ." (King Aff. at 4). The same opinion is given by Dr. Horger at the Medical University of South Carolina (Horger Aff. at 6).

Even the depositions cited by the appellant indicate that fetal birth weight is not conclusive. Dr. Kanitkar admits to discrepancies of up to four weeks (Kanitkar Dep. at 11, 12). Similarly, Dr. Wall and Dr. Garrett admit to the imprecise nature of fetal birth weights. (Wall Dep. at 3, and Garret Dep. at 12). Further, even if the Doe fetus is conclusively established to be 28

weeks gestation, this would not necessarily indicate viability. As Dr. Garrett, the pathologist who performed the autopsy on the Doe fetus testified concerning the cause or causes of death:

> "Well, in my opinion, the major underlying cause which virtually everything else in the autopsy report could be explained on, is the fact that he was markedly premature when born. And, this led to many of the complications which are listed here, which are pathologic findings, all of which added up to his demise." (Garrett Dep. at 37).

Indeed, appellant's brief admits that "death was caused by the numerous complications which arose from the child's premature birth." (Appellant's brief at 6). Prematurity and pre-viability are closely related.

Not only does Anders insufficiently discuss the need for flexible professional determinations of viability, but he also fails to consider the unavailability of "medical skill and technical ability" that aid in determining viability. In this case, appellant apparently suggests that ultrasound would have been appropriate in this case. Yet, the deposition of Dr. Dennis, the Director of Obstetrics and Gynecology at Richland Memorial Hospital, mentioned in appellant's brief (J.S. at 7) indicates that ultrasound was not locally available between July and September, 1974, when Dr. Floyd determined the gestational age. Dr. Dennis was asked how long ultrasound had been available at the hospital. He responded:

> "Well, the unit was purchased in July, [1974] but as far as any effective utilization of it, then I would say that December, January of this year [1975] would be the first, for the initial months of it – purely that we were investigating or learning to use it ourselves." (Dennis Dep. at 17).

And Dr. Horger, Professor of Obstetrics and Gynecology at the Medical University of South Carolina, stated in his affidavit:

> "Unfortunately, ultrasound was not available for use in the Columbia, South Carolina area during the period between June and September, 1974." (Horger Aff. at 5).

Thus, all of the evidence indicates that appellant Anders misunderstood the medicine of this case as badly as the law.

B. If Not Pre-Viable, the Louise Doe Abortion was Within the Mental Health Qualification of *Roe v. Wade*

Even if one assumes the unlikely alternative of a deliberate post-viable abortion on Louise Doe, the mental health qualification of *Roe* was satisfied as shown by the medical charts of Louise Doe, and the affidavits of Dr. Floyd's assistants who had contact with Louise Doe.

Roe and *Doe* include under mental health "that the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 191-192 (1973). *Doe* incorporporated from *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), a definition of health encompassing "psychological as well as physical well-being." *Doe, supra*, 410 U.S. at 191-192. Further, this Court emphasized the need for such factors: "This allows the attending physician the room he needs to make his best medical judgment." 410 U.S. at 192.

Here there was substantial *uncontradicted independent evidence* in the medical records of Louise Doe that she was "very upset," "very desperate," "determined to

have an abortion" and "very depressed." Two nurses and a social worker made these observations separately. They show that the abortion was necessary for Louise Doe's psychological well-being, whatever the length of pregnancy, and was, therefore, within the parameters of the federally protected right of privacy. Yet, the appellant's brief fails to even mention, let alone refute, the mental health qualification of *Roe*.

CONCLUSION

For the reasons set forth above, the Court should dismiss this appeal for want of a substantial federal question or, in the alternative, affirm the judgment of the United States District Court for the District of South Carolina, Columbia Division.

Respectfully submitted,

By: _____
ROY LUCAS

By: _____
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By: _____
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS, APPELLANT,

versus

JESSE J. FLOYD, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

BRIEF FOR JAMES C. ANDERS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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I.

Dismissal or summary affirmance would precipitate the invalidation of a number of State statutes which were based on the language of ROE v. WADE.

Concerning the constitutionality of § 44-41-20(c), it was noted in the Jurisdictional Statement that the lower court erred in holding the statute unconstitutional because the court applied the more restrictive Missouri definition of viability rather than the one set forth by this Court in *Roe v. Wade,* 410 U. S. 113, 160 (1973). Dr. Floyd does not address this distinction, but instead contends that "Since the statute is invalid, this Court need not be concerned with

differences, if any, between the Missouri and *Roe* definitions of viability." (Motion at 24). However, as this Court noted in *Planned Parenthood of Missouri v. Danforth,* 428 U. S. 52, 64, the Missouri definition may well place viability later in pregnancy than the point of viability as defined in *Roe.* Thus, dismissal of this appeal or summary affirmance of the lower court's order would effectively bind the lower federal courts to a stricter definition than *Roe* required, *see Hicks v. Miranda,* 422 U. S. 332, 345 (1975), and would lead to the invalidation of the statutes of a number of States which after *Roe* defined viability by following this Court's language almost exactly.[1]

II.

Question III of Dr. Floyd's motion raises questions which cannot be answered upon this record.

As has already been noted (J. S. at 15, n. 7), the record in this case was developed as directed by the district judge only on the question of prosecutorial bad faith, an inquiry which does not turn on the sufficiency of the evidence at the state level. *Cameron v. Johnson,* 390 U. S. 611, 621 (1968). Nevertheless, Dr. Floyd asserts that some of the facts in this less-than-complete record support a conclusion that the fetus was pre-viable as a matter of law. However, even without full development of the record on the question of the viability of this fetus, considerable dispute is reflected therein concerning the facts upon which Dr. Floyd relies. In addition to the conflicting expert opinions as to the interpretation of birth weights, already discussed (J. S. at 7-8), the record contains a number of indications that the size and stage of development of this fetus were neither as

[1] See, e.g., Pennsylvania Abortion Control Act of 1974, § 2; Kentucky Revised Statutes, § 311.720.

unknown or as unknowable as Dr. Floyd has suggested. For instance, although Dr. Floyd states that he "openly and reasonably thought [this] to be a lawful pre-viable 24-week therapeutic abortion" (Motion at 13), he apparently was careful to leave nothing in writing at the hospital which would reflect this "open, reasonable and lawful" opinion. Louise's hospital record sheets, which in the usual case would contain the patient's history and physical condition and tell why she was admitted, are a series of blank pages save only Louise's name, address and next of kin.[2] As to the "unknowability" of the fetus's state of development, Dr. Floyd quotes the testimony of two witnesses to the effect that the more reliable ultrasound method of determining viability was unavailable at the time in Richland Memorial Hospital and in Columbia. However, Dr. Dennis, quoted by Dr. Floyd, also testified that ultrasound equipment was probably available at another hospital in the city (Dennis Dep. at pp. 17-18); the testimony of two other physicians was to the same effect and therefore equally contrary to Dr. Floyd's assertion. (Kanitkar Dep. at p. 18; Wyman Dep. at p. 32).

In summary, this case possesses neither a complete record nor the conclusions of a factfinder resolving the factual questions which even the incomplete record raises, and consideration of the issues raised by Question III of the Motion should thus be deferred.

[2] Riddle Dep., Ex. 1.

III.

The timing of the grand jury's vote is reflected in the record in a deposition taken by Dr. Floyd.

Dr. Floyd asserts that "Anders cannot elevate an unpublished grand jury vote to an 'ongoing state proceeding.' The vote was secret. No one knows the numbers in favor or even the time of the day of the vote." (Motion at 8). This statement is as disingenuous as it is misleading. The deposition of the grand jury foreman was taken not by Anders but by Dr. Floyd, who apparently was quite willing to inquire into the timing of the grand jury's vote until he found that the vote took place a number of hours before the federal hearing.[3] This very limited intrusion by Dr. Floyd into the grand jury's processes was sanctioned by the district judge shortly before the deposition began. *See* Taylor Dep. at 2. Moreover, this contention by Dr. Floyd does not address the issue of the prosecution having commenced with the presentment of the case to the grand jury, regardless of the timing of the vote.

---

[3] While Dr. Floyd maintains that the time of day of the vote was unknown, the record plainly refutes this statement:

> Q. Mr. Taylor [grand jury foreman], what time of day did the Grand Jury vote to return a true bill?
>
> A. We voted immediately after Mr. Cook left.
>
> Taylor Dep. at 5.

The record elsewhere establishes that Mr. Cook, the investigator who presented the case to the grand jury, appeared before the grand jury on the morning of August 28, 1975. Taylor Dep. at 4, 6; Cook Dep. at 47. The federal hearing took place in the afternoon of that day.

CONCLUSION

For the reasons set forth above and in the jurisdictional statement, it is submitted that the Court should note probable jurisdiction and set the case for plenary review.

Respectfully submitted,

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On Appeal from the United States District Court for the District of South Carolina, Columbia Division

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MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL OR GUARDIAN AD LITEM FOR UNBORN CHILDREN

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In The
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MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL OR GUARDIAN AD LITEM FOR UNBORN CHILDREN

The Court is moved to appoint Alan Ernest as counsel or guardian ad litem to represent the unborn children in this case. There is no counsel to represent the unborn children, yet it is their right to life that is at issue. The Guardian will defend the constitutional right to life of unborn children, as outlined below, which neither of the parties will do.

INTEREST OF THE GUARDIAN

Alan Ernest is a lawyer in the District of Columbia. His interest is to protect the constitutional rights of unborn children.

It is the purpose of the Guardian to present evidence on behalf of the unborn to show that the unborn are persons within the language and meaning of the Fourteenth Amendment. It is the purpose of the Guardian to present evidence on behalf of the unborn to show that Roe v Wade, 410 US 113(1973) is based on false evidence and is no law at all.

QUESTIONS PRESENTED BY GUARDIAN

For the fifteenth time, the Supreme Court is petitioned to overrule its abortion decision, Roe v Wade, 410 US 113(1973), on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See THE CASE AGAINST THE SUPREME COURT, at 5-6, infra.

OUTLINE OF CONSTITUTIONAL ISSUES PRESENTED BY THE GUARDIAN

The Guardian's case was well presented in the ninth petition to overrule Roe v Wade(David Gaetano v Earl Silbert, United States Attorney for the District of Columbia, No. 77-1406, Cert. denied May 1, 1978):

"An EXHIBIT A established that Roe v Wade was based on false evidence by showing that(See EXHIBIT A, page 1, "Summary of Evidence"):

"1. even the Supreme Court admitted in Roe v Wade that if the unborn were a ' "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion on demand 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive <u>any person</u> of life . . . without due process of law') (emphasis added) on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and the Federal Convention of 1787) show that the Supreme Court has no lawful power to construe exceptions to express, universal terms (such as 'any person') unless the Court can

prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers, the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court exactly violated the very letter of the Constitution, as well as its spirit, and condemned millions of victims to death whom the Constitution endeavours to preserve."

. . . .

"Roe v Wade asserts a second method . . . for the government to condemn persons to death:

"The First, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right to representation by counsel; with right to be acquitted unless found guilty beyond a reasonable doubt; with provision to stop execution if new evidence is discovered.

"The Second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims)to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution, falsifying evidence to make the homicides appear legal, and year after year to repeatedly deny applications showing the exterminations to be illegal.

. . . .

"(I)n 1975, the Supreme Court of Germany held that the clause in the German Constitution, "Everybody has the right to life," also "includes unborn human beings," that "Abortion is an act of homicide," and the state has a "duty" under the Constitution " to protect unborn life." See translation, 63 California Law Review at 1342, 1348-49. . . . (I)t is of paramount importance to examine how it is possible for the high courts of two major nations, construing constitutional phrases that are in substance identical, to reach diametrically opposing conclusions about the legality of millions of premeditated homicides. That examination, presented in EXHIBIT A, surely permits reasonable people to conclude beyond a reasonable doubt that the Supreme Court closed its eyes on the Constitution and condemned to death those victims whom the Constitution endeavours to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany, so the Court is to America.

"If it be true, as Chief Justice Marshall once held(see Marbury v Madison, 1 Cranch 137, 163, 176, 178) that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of government.

. . . .

"APPENDIX
"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

DAVID GAETANO and ALAN ERNEST, Next Friend of Unborn Child Roe and All Others Similarly Situated, PETITIONERS	)	
vs.	)	No. 77-1406
EARL J. SILBERT, United States Attorney for the District of Columbia, RESPONDENT	)	

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

Wade H. McCree, JR.
Solicitor General

APRIL 6, 1978

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 1, 1978

Alan Edward Ernest, Esq.
5713 Harwich Ct.
#232
Alexandria, VA 22311

RE: David Gaetano, et al.
v. Earl J. Silbert, etc.
No. 77-1406

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By
/s/ Edward Faircloth
Assistant Clerk

And silence, in the face of a charge, can be taken as an admission that the charge is true. See McCormick on Evidence 651-54(2d ed 1972).

CONCLUSION

The Court is moved to appoint Alan Ernest as counsel or guardian ad litem so that the unborn will have a lawyer to defend their constitutional right to life.

It can not be pretended that it is any longer the government of the United States,-any government of Constitution and laws,- if these unborn children are to be denied representation of counsel to defend their constitutional right to life.

Alan Ernest
5713 Harwich Ct #232
Alexandria, Va 22311

Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1255

JAMES C. ANDERS

Appellant

vs.

JESSE J. FLOYD, M.D.

Appellee

On Appeal from the United States District Court for the District of South Carolina, Columbia Division

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE FOR THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANT

Alan Ernest
5713 Harwich Ct. #232
Alexandria, Va 22311

Counsel for amicus curiae

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1255

JAMES C. ANDERS, Appellant

vs.

JESSE J. FLOYD, M.D., Appellee

On Appeal from the United States District Court for the District of South Carolina, Columbia Division

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANTS

The Legal Defense Fund For Unborn Children is an organization whose purpose os to defend the constitutional rights of unborn children.

The interest of this amicus brief is to present to the Court a position that will not be presented by the parties. The amicus alleges that it can prove that Roe v Wade, 410 US 113(1973) is based on false evidence and millions of lives have been illegally exterminated. Of course, this requires the overruling of that case. If Roe v Wade were overruled, it would obviously be dispositive of this case.

Alan Ernest
Counsel for Amicus

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1255

JAMES C. ANDERS, Appellant

vs.

JESSE J. FLOYD, M.D., Appellee

On Appeal from the United States District Court for the District of South Carolina, Columbia Division

AMICUS CURIAE BRIEF ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANTS

The interest of the amicus is set out in the attached motion.

SUMMARY OF ARGUMENT

For the 14th time, the Supreme Court is petitioned to overrule its abortion decision, Roe v. Wade, 410 US 113(1973), on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See THE CASE AGAINST THE SUPREME COURT, at 5-6, infra.

ARGUMENT

In 1975, the Supreme Court of West Germany held that the clause in the German Constitution, "Everybody has the right to life," also "includes unborn human beings," that "Abortion is an act of homicide," and the state had a "duty" under the Constitution "to protect unborn life." See translation in the 63 California Law Review at 1342, 1348-49. It is of paramount importance to examine how it is

possible for the high courts of two major nations, construing constitutional phrases that are in substance identical, to reach daimetrically opposing conclusions about the legality of millions of premeditated homicides. That examination, outlined in this brief, surely permits reasonable people to conclude beyond a reasonable doubt that the U.S. Supreme Court closed its eyes on the Constitution and condemned to death those victims whom the Constitution endeavours to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany, so the Supreme Court is to America.

The amicus's case was well presented in the ninth petition to overrule Roe v Wade(David Gaetano v Earl Silbert, United States Attorney for the District of Columbia, No. 77-1406, Cert. denied May 1, 1978):

"An EXHIBIT A established that Roe v Wade was based on false evidence by showing that(See EXHIBIT A, page 1, "Summary of Evidence"):

"1. even the Supreme Court admitted in Roe v Wade that if the unborn were a '"person" within the language and meaning of the Fourteenth Amendment' then the case for abortion on demand 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') (emphasis added) on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and the Federal Convention of 1787) show that the Supreme Court has no lawful power to construe exceptions to express, universal terms (such as 'any person') unless the Court can

prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers, the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever.(The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court exactly violated the very letter of the Constitution, as well as its spirit, and condemned millions of victims to death whom the Constitution endeavours to preserve."

. . . .

"Roe v Wade asserts a second method . . . for the government to condemn persons to death:

"The First, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right to representation by counsel; with right to be acquitted unless found guilty beyond a reasonable doubt; with provision to stop execution if new evidence is discovered.

"The Second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims)to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution, falsifying evidence to make the homicides appear legal, and year after year to repeatedly deny applications showing the exterminations to be illegal.

. . . .

"(I)n 1975, the Supreme Court of Germany held that the clause in the German Constitution, "Everybody has the right to life," also "includes unborn human beings," that "Abortion is an act of homicide," and the state has a "duty" under the Constitution " to protect unborn life." See translation, 63 California Law Review at 1342, 1348-49. . . . (I)t is of paramount importance to examine how it is possible for the high courts of two major nations, construing constitutional phrases that are in substance identical, to reach diametrically opposing conclusions about the legality of millions of premeditated homicides. That examination, presented in EXHIBIT A, surely permits reasonable people to conclude beyond a reasonable doubt that the Supreme Court closed its eyes on the Constitution and condemned to death those victims whom the Constitution endeavours to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany, so the Court is to America.

"If it be true, as Chief Justice Marshall once held(see Marbury v Madison, 1 Cranch 137, 163, 176, 178) that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of government.

. . . .

"APPENDIX
"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

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"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

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"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

DAVID GAETANO and ALAN ERNEST, Next Friend of Unborn Child Roe and All Others Similarly Situated, PETITIONERS	)	
vs.	)	No. 77-1406
EARL J. SILBERT, United States Attorney for the District of Columbia, RESPONDENT	)	

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

Wade H. McCree, JR.
Solicitor General

APRIL 6, 1978

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 1, 1978

Alan Edward Ernest, Esq.
5713 Harwich Ct.
#232
Alexandria, VA 22311

RE: David Gaetano, et al.
v. Earl J. Silbert, etc.
No. 77-1406

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By
/s/ Edward Faircloth
Assistant Clerk

And silence, in the face of a charge, can be taken as an admission that the charge is true. See McCormick on Evidence 651-54(2d ed 1972).

CONCLUSION

For the 14th time, the Supreme Court is petitioned to overrule its abortion decision, Roe v. Wade, 410 US 113(1973), on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated.

Can it be pretended that it is any longer the government of the United States,-any government of Constitution and laws,- wherein a Tribunal holding office for life and asserting to be the ultimate arbiter is charged year after year with millions of illegal homicides by false evidence, and year after year the Tribunal summarily refuses to even listen?

Alan Ernest
5713 Harwich Ct #232
Alexandria, Va 22311

Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1255

JAMES C. ANDERS

Appellant

vs.

JESSE J. FLOYD, M.D.

Appellee

On Appeal from the United States District Court for the District of South Carolina, Columbia Division

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MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE BY DAVID GAETANO IN SUPPORT OF THE APPELLANT

ALAN ERNEST
5713 Harwich Ct. #232
Alexandria, Va 22311

Counsel

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE BY DAVID GAETANO
IN SUPPORT OF THE APPELLANT

The interest of the amicus is to protect the constitutional rights of children unborn and born alive. David Gaetano is well known for his pro-life work in the Washington area. Mr. Gaetano was once quoted in The Washington Post, "I don't think a judge can just say anything and that's the law." "It's like Nazi judges allowing Jews to be exterminated." July 21, 1978, p. B5.

The amicus submits newly discovered evidence, not submitted by the parties, to show that many killings that Roe v Wade asserted to legalize, were murder in the first degree in 1868. This evidence has never been submitted to the Court before.

Obviously, children whose lives were protected by the murder statutes in 1868 are persons within the language and meaning of the Fourteenth Amendment. Absent an amendment to the Constitution, the killings of these children are still murder.

The evidence shows that the child killed in this very case was just such a child within the protection of the murder statutes, and a person within the language and meaning of the Fourteenth Amendment. Roe v Wade cannot pretend to legalize such a killing.

Additionally, this motion endorses the evidence submitted by The Legal Defense Fund For Unborn Children in this case.

Upon the evidence presented, and adopted, herein, the amicus demands that Roe v Wade, 410 US 113(1973) be overruled.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins Bk.1, ch. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of the opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 2 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost all are born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel